

(21,347.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, wherein Mariano F. Sena, was plaintiff in error, and The American Turquoise Company, was Defendant in error, a manifest error hath happened, to the great damage of said Plaintiff in error as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, sixty days from the date hereon, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the Supreme Court of the Territory of New Mexico, the fourth day of September A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of the Territory of N. M.

1a TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory of Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Be it remembered, That heretofore, on to-wit: on the first day of September, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record, in a certain cause, entitled, Mariano F. Sena, Plaintiff in

Error, vs. The American Turquoise Company, defendant in error, Numbered, 1167, which said transcript of record, was and is in words and figures following to wit:—

2 Be it remembered that heretofore, to-wit, on the 4th day of May, 1903, there was filed in the office of the Clerk of the District Court of the County of Santa Fe, Territory of New Mexico, a complaint in ejectment, which said complaint is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Santa Fe:

In the District Court for said County, Sitting for the Trial of Causes Arising under the Laws of said Territory, A. D. 1903.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of said Territory and Judge of said District Court:

Mariano F. Sena, resident of said county and Territory, plaintiff, complains of J. P. McNulty, also resident of said county and territory, and The American Turquoise Company, a corporation organized and doing business under the laws of the State of New Jersey, defendants, in a plea of ejectment, for that whereas, heretofore to-wit, on the fifteenth day of April, A. D. 1903, at the County of Santa Fe aforesaid, plaintiff was entitled to the possession of that certain piece or parcel of land, commonly known as the Jose de Leyba Grant, situate in the county aforesaid, being the same tract of land which was granted to Jose de Leyba by the governor and captain-general of New Mexico on May 25, 1728, which tract is bounded on the east by the San Marcos road, on the south by an arroyo called Cuesta del Oregano, on the west by lands formerly of Juan Garcia de las Rivas and now commonly known as the lands of the Pueblo Viejo de la Cienega, and on the north by lands formerly of Captain Sebastian de Vargas on the road that goes from Cerrillos to Pecos; and afterwards, to-wit, on the day and year aforesaid, at the county aforesaid, defendant entered into said premises, and particularly into certain alleged mining claims known as the "Muniz" containing ten and four one-hundredths acres; the "Castillian" containing ten and twenty one hundredths acres; and the "Gem Group, consisting of the Gem, Morning Star and Sky Blue", containing thirty and thirty-nine one-hundredths acres, all situated in Section 21, Township 15 north, Range 8 east, County and Territory aforesaid, and all being situate within the exterior boundaries of said grant of land, and unlawfully withheld, and thence hitherto hath unlawfully withheld and still doth unlawfully withhold from plaintiff the possession thereof, to his damage in the sum of \$100,000; therefore plaintiff brings suit and prays judgment of this Honorable Court for the recovery of the possession of the said premises and for the sum of \$100,000 his damages as aforesaid and for costs.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Plaintiff.

And afterwards, on the 14th day of May, 1903, there was filed in the office of said clerk, the answer and disclaimer of J. P. McNulty, which is in the words and figures following, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Santa Fe, Territory of New Mexico.

No. 4527.

MARIANO F. SENA, Plaintiff,

vs.

J. P. McNULTY and the AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Now comes J. P. McNulty, one of the above named defendants, and for his separate answer to the complaint filed herein, says that he is not guilty of the detention and wrongs mentioned in said complaint. That he is not now and never has been in possession of the lands and premises therein mentioned except as an employee and agent of the American Turquoise Company for its benefit. That he disclaims any possession or claim thereto except as such employee and agent for the benefit of said American Turquoise Company, and therefore prays to be dismissed here with his costs herein.

J. P. McNULTY,

By EDWARD L. BARTLETT,
His Attorney, Santa Fe, N. M.

4 And afterwards, to-wit, on the 8th day of October, 1903, there was made and entered of record in said cause, the following order:

District Court, Sante Fe County.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY and J. P. McNULTY.

Now comes the said plaintiff by his attorneys and says to the court that he will not further prosecute his complaint against the said defendant, J. P. McNulty, but dismisses the same. It is therefore considered and adjudged by the court that the said J. P. McNulty, as to said complaint go hence without day, and recover of said plaintiff his costs in this behalf expended to be taxed.

JOHN R. McFIE,

Associate Justice, etc.

And afterwards, towit, on the 28th day of January, 1904, there was made and entered of record in said cause, an order changing the venue thereof, which said order is as follows:

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting in and for the County of Santa Fe.

No. 4527.

M. F. SENA, Plaintiff,

vs.

J. P. McNULTY et al.

This cause coming on to be heard by the court upon the application of the plaintiff for a change of venue in said cause to some other district free from exception and the court having had the same under advisement and the plaintiff and defendant by their respective attorneys, F. W. Clancy for the plaintiff, and Edward L. Bartlett for the defendant, having agreed thereto, it is now ordered and adjudged by the court that the venue of said cause be changed to the county of San Miguel in the fourth judicial district, and that the clerk of this court transmit all the papers in said cause to the clerk of the fourth judicial district, together with certified copies of all record entries made herein. And it is so ordered.

JOHN R. McFIE,

*Associate Justice of the Supreme Court and
Judge of the First Judicial District.*

5 And afterwards, to-wit, on May 20, 1904, there was filed in the office of the clerk of the district court of San Miguel county, the amended answer of said defendant, which is in the words and figures following, to-wit:

In the District Court, San Miguel County.

MARIANO F. SENA, Plaintiff,

vs.

THE AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Amended Answer.

Now comes the American Turquoise Company, one of the defendants in the above entitled cause, and by leave of the court first had and obtained, for its amended answer to the complaint filed herein says:

1. It is not guilty of the detention and wrongs in said complaint charged against it, and that it is not now and was not in the unlawful possession of the lands described in said complaint on the 13th day of April, 1903, or at any other time. Nor was the said plaintiff at that time or at any other time entitled to the possession of the same or any part thereof.

2. And for another and further defense this defendant says that the plaintiff ought not to have or maintain this action, for that it is the owner and in possession of the land sued for in plaintiff's complaint, and it and those under whom it claims entered into the possession of the same lawfully and peaceably and have remained in the continuous, exclusive, actual, peaceable, hostile and open possession of the same continuously, under color of title and in good faith, and have made large lasting, valuable improvements thereon, and have paid taxes thereon, lawfully assessed against the same, down to the present time, working and operating the same, openly, exclusively and continuously for more than ten years before the filing of this suit, and after the right to commence and maintain the same has come fallen or accrued.

3. For another and further defense defendant says that the plaintiff ought not to have or maintain this action, for that as early as the year 1839, the predecessors in title, if any they had, of this plaintiff, abandoned all possession of said land, if they were in possession thereof, and never thereafter, by their agents or otherwise, asserted

6 any right to the possession or control over, or interest in the whole or any portion of the land included or intended to be included within the boundaries of said land grant mentioned in said complaint, or of the property or any portion thereof sued for. That from and after said time said land remained vacant, unoccupied and unclaimed, and none of the plaintiff's predecessors in title have ever been or are now in the possession of the whole or any portion of the land included within the boundaries of said land grant, set up in said complaint, nor any portion of the land sued for in this case. That under and by virtue of the treaty of Guadalupe Hidalgo between the United States and Mexico, of 1848, the territory within which the property sued for lies was ceded by the Republic of Mexico to the United States and jurisdiction thereover and possession thereof, under and by virtue of said treaty, was taken by the United States. That at said time said land was vacant, unclaimed, unoccupied and abandoned by the predecessors in title of this plaintiff, if any title, interest or right they had. That thereafter, the United States in the exercise of its jurisdiction and power passed an act entitled "An Act to establish the office of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," approved July 22, 1854, under and by virtue of the eighth section of said act it was made the duty of the surveyor general under such instructions as may be given by the secretary of the interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and for this purpose may issue notice, summon witnesses, administer oaths, and do and perform all necessary acts in the premises; he was also required to make full report upon all such claims originating before the cession of the Territory to the United States, under the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title with his decision as to the validity or invalidity of the same under the laws, usages and customs of the country before its cession to the United States. Said report was to be made according

to the form which might be prescribed by the secretary of the interior, which report was to be laid before congress for such action thereon as might be deemed just and proper, with a view of confirming *bona fide* grants and giving full effect to the treaty of 1848 between the United States and Mexico, and until the final action of congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donation granted by the previous provisions of this act.

By the ninth section of said act full power and authority was given the secretary of the interior to issue all needful rules and regulations for fully carrying into effect the provisions thereof.

That thereafter, to-wit, the secretary of the interior in the exercise of the lawful authority conferred upon him by the eighth section of said act of July 22, 1854, issued his instructions to the surveyor general of New Mexico, in and by which he directs the surveyor general as follows:

"Upon your arrival at Santa Fe you will make application to the governor of the Territory for such of the archives as relate to grants of land by the former authorities of the country. You will see that they are kept in a place of security from fire, or other accidents, and that access is allowed only to land owners who may find it necessary to refer to their title records, and such reference must be made under your eye, or that of a sworn employé of the government.

"You will proceed at once to arrange and classify the papers in the order of date, and have them properly and substantially bound. You will then have schedules (marked 1) of them made out in duplicate, and will prepare abstracts (No. 2) also in duplicate, of all the grants found in the records, showing the names of grantees, date, area, locality, by whom conceded, and under what authority.

* * * * *

"The knowledge and experience you will acquire in arranging the archives, collecting materials, and making out the documents called for by these instructions, will enable you to enter understandingly upon the work of receiving and examining the testimony which may be presented to you by land claimants, and prepare your report thereon, for the action of congress.

"In the first instance, you will provide yourself with a journal, consisting of substantially bound volume or volumes, which is to constitute a complete record of your official proceedings in regard to land titles; and with a suitable docket, for the entry therein of claims in the order of their presentation, and so arranged as to indicate at a glance a brief statement of each case, its number, name of original and present claimant, area, locality, from what authority derived, nature of title—whether complete or incomplete, and your decision thereon.

8 "Your first session will be held at Santa Fe, and your subsequent sessions at such places and periods as public convenience may suggest, of which you will give timely notice to the department.

"You will commence your session by giving public notice of the same, in a newspaper of the largest circulation in the English and

Spanish languages—will make known your readiness to receive notices and testimony in support of the land claims of individuals, derived from the change of government.

"You will require claimants in every case—and give public notice to that effect—to file a written notice setting forth the name of 'present claimant;' name of the 'original claimant;' nature of claim—whether inchoate or perfect; its date; from what authority the original title was derived, with a reference to the power and authority under which the granting officer may have acted; quantity claimed, locality, notice, and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim, and to show a transfer of right from the 'original grantee' to 'present claimant.'

"You will also require of every claimant an authenticated plat of survey, if a survey has been executed, or other evidence, showing the precise location and extent of the tract claimed.

"This is indispensable, in order to avoid any doubt hereafter in reserving from sale, as contemplated by law, the particular tract or parcel of land for which a claim may be duly filed, or in communicating the title to the same hereafter, in the event of a final confirmation.

"The effect of this will be not only to save claimants from embarrassment and difficulties, inseparable from the presentation and adjudication of claims with indefinite limits, but will promote the welfare of the country generally, by furnishing the surveyor general with evidence of what is claimed as private property under the treaty and the act of July 22, 1854; thus enabling him to ascertain what is undisputed public land, and to proceed with the public surveys accordingly, without awaiting the final action of congress upon the subject.

"You will take care to guard the public against fraudulent or antedated claims, and will bring the title papers to the test of the genuine signatures, which you should collect of the granting officers, as well as to the test of the official registers or abstracts which may exist of the title issued by the granting officers.

In all cases, of course, the original title papers are to be produced, or loss accounted for; and where copies are presented, they must be authenticated; and your report should also state the precise character of the papers acted upon by you, whether originals or otherwise. Where a claim may be presented by a party as 'present claimant' in the right of another, you must be satisfied that the deraignment of title is complete; otherwise, the entry and your decision should be in favor of the 'legal representative' of the 'original grantee.'"

That thereafter, in compliance and obedience to said act of July 2, 1854, and the said letter of instructions of the secretary of the interior, of August 21, 1854, the surveyor general of New Mexico did issue and give notice to the inhabitants of New Mexico that—

"Claimants in every case will be required to file a written notice, setting forth the name of the 'present claimant,' name of the 'original claimant'—nature of claim, whether inchoate or perfect—its date—from what authority the original title was derived—with a

reference to the evidence of the power and authority under which the granting officer may have acted—quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim, and to show transfer of right from the 'original grantee' to 'present claimant.'

"Every claimant will also be required to furnish an authenticated plat of survey, if a survey has been executed, or other evidence showing the precise locality and extent of tract claimed.

"To enable the surveyor general to execute the duty thus imposed upon him, by law, he has to request all those individuals who claimed lands in New Mexico before the treaty of 1848, to produce the evidence of such claims at this office at Santa Fe as soon as possible."

Which said notice was given on the 18th day of January, 1855, and report thereof duly made to the secretary of the interior. That although said act of July 22, 1854, and the instructions of the secretary of the interior remained in full force and effect and in full virtue and operation in said Territory until the 3rd day of March, 1891, yet, wholly ignoring and disregarding the provisions made for the protection and assertion of rights and preservation thereof, furnished notice to the United States and all others, plaintiff's predecessors in title, right or claim, failed, neglected and refused to in any manner and by any means avail themselves of the beneficent provisions provided for their protection, and particularly for the protection of the citizens of the United States, and in nowise gave notice to the surveyor general of the Territory of New Mexico, or to any other lawful authority or person that they or any of them claimed or intended to claim any right, title or interest in and to said land grant, or they had any interest therein, or asserted the same, or claimed the possession, or right to the possession thereof.

The said land remaining so vacant, abandoned and unoccupied, the United States in the year 1861, caused the public surveys to be extended over the same as vacant, unoccupied, and unclaimed land, and as public land belonging to the United States under the said treaty of Guadalupe Hidalgo; and although the said extension of said surveys over the same was made and approved in August, 1861, yet the said land was withheld from sale and entry under the laws of the United States until March 1, 1885, when the survey thereof was filed with the register of the United States land office at Santa Fe, New Mexico, from and after which date the lands were offered by the United States to its citizens as public lands and entries and filings thereon received and fully recognized by the United States. That during all this time, and for many years prior to the treaty of Guadalupe Hidalgo between the Republic of Mexico and the United States of date February 2, 1848, neither the predecessors of the plaintiff nor any one for them ever claimed, asserted or possessed said lands or any part thereof under a grant or otherwise, and in no manner gave any notice of said claim or right thereunder, either to the surveyor general of New Mexico or other officer or person,

that they or any of them claimed or intended to claim said lands or any portion thereof; nor did they or any of them, or this plaintiff, ever apply or request in any manner that said lands should be withdrawn from sale and settlement under the laws of the United States. That said land being offered by the United States on March 1, 1885, as public land and its citizens invited to explore, exploit and acquire the same under the land and mining laws thereof, and of the Territory of New Mexico, and being so vacant and resumption thereof having been exercised by the United States without claim or notice of any character that plaintiff's supposed
11 predecessors in title claimed the same or any part thereof by virtue of any Spanish or Mexican grant.

That on or about April 1, 1885, one M. K. Parmaly, one of the predecessors in title and possession of this defendant, entered upon and in the possession of the Castillian Quartz Lode mining claim, and duly gave notice thereof on the 22nd day of June, 1885, as required by law.

And thereafter, on or about the 31st day of January, 1890, Pedro Muniz and Faustian Muniz, two of the predecessors in title of this defendant, entered upon and took possession of the Muniz mine, and on or about the 1st day of February, 1890, gave notice thereof, as required by law;

That thereafter, on or about the 21st day of June, 1891, one J. M. Allan, one of the predecessors in title of this defendant, entered upon and took possession of the Morning Star Lode, and on or about the 24th day of August, 1891, gave notice thereof as required by law;

That thereafter, to-wit, on or about the 2nd day of June, 1891, one C. G. Storry, one of the predecessors in title of this defendant, entered upon and took possession of the Gem Lode, and on or about the 24th day of August, 1891, gave notice thereof as required by law;

That on or about the 2nd day of November, 1891, one C. G. Storry, one of the predecessors in title of this defendant, entered upon and took possession of the Sky Blue Turquoise Lode, and on or about the 13th day of March, 1892, gave notice thereof as required by law. All of the land being the property the possession of which is sued for by plaintiff, and all situate in Section 21, Township 15 north, Range 8 east, in the county of Santa Fe, Territory of New Mexico. That although the defendant's predecessors in title, and all those under whom it claims, and the defendant, commencing in the year 1885, and continuously down to the present time, made valuable improvements, developed said mines and mining claims, spent large sums of money thereon and in the development thereof, yet, disregarding the rights of the public and of the predecessors in title of this defendant, the said predecessors in title of this plaintiff, if any right or interest they had thereto, permitted, without protest, without objection, and without notice, said mines and property to be bought in open market, and permitted the same as early as the year 1892 to be mortgaged to secure the payment of a large

sum of money, to-wit, — dollars, which said mortgage was
12 duly recorded in Book "G," record of mortgages, at page
465, in the office of the probate clerk and ex-officio recorder
of Santa Fe county, New Mexico, on June 13, 1892, and yet, the predecessors in title of this plaintiff, if any claim they had, asserted no title or interest in, or right to the possession of, and gave no notice, although the acts and doings, the assertion and dealings of said property by the predecessors in title of this defendant, from the date of the original entry into possession of each and every of said mining claims, was well known and notorious and exclusively maintained, and in each and every instance made a matter of record in the district court of Santa Fe county, in the records of deeds, mortgages and mining locations, in the records of Santa Fe county, and in the records of the United States land office, in the City of Santa Fe, in the county of Santa Fe. That although the courts and offices of the Territory of New Mexico and of the United States were open to and invited, and justice and common fairness and honesty required that the plaintiff and his predecessors in title should and must assert seasonably their claim or claims to said lands, or the possession thereof, if any they had, as would appraise this defendant and its predecessors in title and possession.

That this defendant and its predecessors, in title and possession and through and under whom it claims have in all respects complied with the laws of the United States and the Territory of New Mexico relating to mining locations, and also the rules governing the location of mines in the Cerrillos Mining District of Santa Fe county, New Mexico, and have fully performed all work of development at large expense, and paid all dues and lawful demands, and made all necessary and proper proofs thereof to the proper officers of the United States.

That on the 3rd day of March, 1891, the Congress of the United States passed an act entitled "An Act to establish the Court of Private Land Claims and to provide for the settlement of private land claims in certain states and territories."

That by the provisions of the fifteenth section thereof, Section 8 of the act of Congress approved July 22, 1854, entitled "An Act to establish the office of Surveyor General of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," and all acts amendatory or in extension thereof,
13 or supplementary thereto, and all acts and parts of acts inconsistent with the provisions of this act were repealed.

That thereafter and while said land was open and offered by the United States for entry under the public land and mining laws of the United States, three of said mining claims, to-wit, the Morning Star Lode, the Gem Lode, and the Sky Blue Turquoise Lode were located and filed upon and possession thereof taken by the predecessors in title of this defendant and have been continuously held by them and this defendant down to the present time. That no notice, claim or act was taken or done by any one claiming any right, title or interest in and to the said land grant or the land covering the mining locations sued for in this case, so far as this de-

fendant or any one under whom it claims *were* advised or had any knowledge or information; but that the same was vacant, unoccupied and abandoned by the predecessors in title of this plaintiff, and during which time large sums of money were being expended for labor and material, improvements and development of said mining claims, without protest and without notice to the predecessors in title of this defendant that any such claim as is now asserted existed.

That in the year 1895, this plaintiff having discovered that said mining claims might be by some possibility included within the outboundaries of an old Spanish grant alleged to have been made in 1728 by Governor and Captain General Juan Domingo de Bustamante to one Jose de Leyba, he hunted up and procured from two of the supposed lineal descendants of the said Jose de Leyba for a nominal consideration general warranty deeds therefor, dated respectively August 16, 1895, and September 11, 1895. That up to said date no descendant or lineal descendant, heir or other person, having asserted claim or pretended to claim any right, title or interest in and to said lands, under and by virtue of said grant, and made no claim and asserted no right thereto, although the public surveys were extended over the same in 1861, was open for settlement and entry in 1885, and continued so to the present time, under claim and exercise of right by the United States and by the predecessors in title of this defendant, and this defendant. That by the act of extending the public surveys over the said land, by the filing of the plat of said survey in the United States land office, at the City of Santa Fe, New Mexico, and offering the same to entry under the public land laws of the United States, and the
14 continuation thereof to the present time, was an entry and a resumption thereof of said land by the United States, without protest and without objection by any one.

That on the 27th day of September, 1899, this plaintiff claiming said land under and by virtue of said deeds from the heirs and assigns of the original grantee, Jose de Leyba, filed his petition in the Court of Private Land Claims, at the city of Santa Fe, New Mexico, against the United States, seeking confirmation and recognition of said grant and the title thereto under the provisions of said act.

That afterwards, to-wit, on the 19th day of December, 1895, this plaintiff filed an amended petition in said Court of Private Land Claims against the United States, wherein there were joined as co-defendants with the United States among others, the defendants herein, J. P. McNulty and The American Turquoise Company; and wherein and by said amended petition this plaintiff alleged that said J. P. McNulty and The American Turquoise Company claimed adverse possession to real estate included in said Jose de Leyba grant otherwise than by the lease and permission of the petitioner therein, this plaintiff.

That thereafter on the 16th day of January, 1900, the defendants herein, J. P. McNulty and The American Turquoise Company, by their attorney, Edward L. Bartlett, filed their answer to said amended petition, wherein and whereby the right of this plaintiff to recover

was put at issue, alleging that they were and had been for many years in the actual, exclusive, open and notorious possession of five mining claims in the southern part of Santa Fe county, being the mining claims herein sued for and alleging that said land described in said grant, or nearly the whole thereof had been officially surveyed under the public laws of the United States, under the direction of the Surveyor General of New Mexico, and for more than twenty years last past had been recognized as public lands of the United States.

That thereafter, to-wit, on the 6th day of April, 1900, the United States filed its answer putting in issue the allegations contained in the plaintiff's petition and amended petition; asserting that the plaintiff was not entitled to confirmation or recognition, and further that said claim or petition not having been filed within two years from March 3, 1891, the claim mentioned in the petition of this plaintiff, filed in said court of private land claims, became
15 and was abandoned and forever barred, and the United States pleaded said limitation as a bar to the confirmation and recognition of said claim.

That thereafter, to-wit, on the 30th day of April, 1900, said cause being at issue, the same was heard by the court of private land claims, and after submission, the court on the 10th day of May, 1900, dismissed plaintiff's petition and declined to recognize or confirm the same.

That thereafter, on the 5th day of November, 1900, this plaintiff, by his attorney, prayed an appeal to the Supreme Court of the United States, which appeal was on the said day allowed by Wilbur F. Stone, Associate Justice of said court. Thereafter said appeal and the transcript of the record thereof was duly forwarded and filed in the office of the clerk of the Supreme Court of the United States on January 22, 1901. Thereafter, on said appeal, the Supreme Court of the United States did, on April 6, 1903, affirm the decree of the court of private land claims entered in said case on the 10th day of May, 1900. That thereafter, on the 24th day of June, 1903, the mandate of the Supreme Court, affirming the decree of the court of private land claims, was duly filed in the office of the clerk of said court.

That on June 1, 1903, upon petition of modification of judgment and for rehearing, filed by this plaintiff in said Supreme Court, it was ordered by said court that the decree of affirmance be amended by adding the following words: "So far as such decree orders that the petition be dismissed, but without prejudice to such further proceedings as petitioner may be advised to take." That on June 24, 1903, said order was filed in the office of the clerk of the court of private land claims, and on the same day an order was entered by the court of private land claims rejecting the claim and dismissing the petition in accordance with said mandate and said order of the Supreme Court; in all of which proceedings in said court of private land claims and in the Supreme Court of the United States the defendants herein, J. P. McNulty and The American Turquoise Company were represented by their counsel, Edward L. Bartlett, Esq.

That during all this time, and long prior to the treaty of Guadalupe Hidalgo, no lineal descendant, heir or other person, save these defendants ever had possession of any portion of the land included within the outboundaries of the land grant to Jose de Leyba of 1728,

16 but that if any possession whatever was had it was many years prior to the cession of this territory to the United States, and

was abandoned long prior thereto, and never resumed, asserted or claimed by any one of them, although they were residents of New Mexico, and not until this defendant and its predecessors in title, without knowledge, information and in good faith entered upon and developed what was supposed to be notoriously in this community, mines of great value and spent large sums of money in developing the same. Was there any attempt ever made or asserted by any one that they were within the boundaries of the Jose de Leyba grant of 1728, or that any claim was made or ever intended to be made against the United States or any one, that such claim existed or would be asserted or that it covered the land in that vicinity?

Therefore, this defendant says that by reason of the facts aforesaid, this plaintiff ought not to have or maintain his action against this defendant, and this it is ready to verify.

THE AMERICAN TURQUOISE CO.

By EDWARD L. BARTLETT,

MATT. G. REYNOLDS,

Its Attorneys.

And afterwards, on May 20, 1904, there was filed in the office of said clerk, the replications of plaintiff to the amended pleas of defendant, which replications are as follows, to-wit:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA,

vs.

THE AMERICAN TURQUOISE COMPANY.

1. Now comes the plaintiff, and for a replication to the first of defendant's amended pleas which is in the nature of the general issue, and whereof it is to be assumed that defendant puts itself upon the country, says that he does the like.

2. Now comes the plaintiff, and as to the second amended plea of defendant which attempts to interpose the defense of the statute of limitations, says that the same is not sufficient to bar plaintiff from having and maintaining his action against defendant, because he says that defendant is a foreign corporation, and this he is ready to verify.

3. And for further replication to said second amended plea, plaintiff says that defendant is a foreign corporation incorporated under the laws of a state of the United States beyond the limits of this territory, and that it did not, as required by law, file any copy of its charter of incorporation or of its articles of incorporation, and of any general incorporation law under which it was incorporated, in the office of the secretary of this territory, nor

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in the office of the recorder of deeds of any county of this territory, until the 28th day of December, 1899, and this the plaintiff is ready to verify.

4. And for a further replication to said second amended plea, plaintiff says that defendant is a foreign corporation incorporated under the laws of a state of the United States beyond the limits of this territory, and that it did not, as required by statute, make and file with the secretary of the territory of New Mexico and in the office of the recorder of deeds of any county in this territory, a certificate signed by its president and secretary, duly acknowledged, designating the principal place where the business of such company should be carried on in this territory, and an authorized agent or agents residing at such principal place of business upon whom process might be served, until the 28th day of December, 1899, and prior to said 28th day of December, 1899, there was no officer or agent of defendant in this territory upon whom valid service of process could be made in suits against defendant and this the plaintiff is ready to verify.

5. And for further replication to said second amended plea plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same title which was on the 19th day of March, 1892, by Chauncy M. Story conveyed to The American Turquoise Company, which was a foreign corporation incorporated under the laws of the state of Illinois, a state of the United States beyond the limits of this territory, and that the said American Turquoise Company did not, as required by law, file any copy of its charter of incorporation or of its articles of incorporation, and of any general incorporation law under which it was incorporated, in the office of the secretary of this territory, nor in the office of the recorder of deeds of any county in this territory, until the 4th day of February, 1897, and this the plaintiff is ready to verify.

6. And for further replication to said second amended plea, plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same

18 title which on the 19th day of March, 1892, by Chauncy M. Story, conveyed to the American Turquoise Company, which was a foreign corporation incorporated under the laws of the state of Illinois, a state of the United States beyond the limits of this territory, and that the said American Turquoise Company did not, as required by statute, make and file with the secretary of the territory of New Mexico, and in the office of the recorder of deeds of any county in this territory, a certificate signed by its president and secretary, duly acknowledged, designating the principal place where the business of such company should be carried on in this territory, and an authorized agent or agents residing at such principal place of business, upon whom process might be served, until the 4th day of February, 1897, and prior to said 4th day of February, 1897, there was no officer or agent of said company in this territory

upon whom valid service of process could be made in suits against it, and this the plaintiff is ready to verify.

7. And for further replication to said second amended plea, plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same title which was, on the 11th day of June, 1897, by J. H. Sutherlin, as special master, conveyed to Howard Carter and William R. Alling, and that said pretended title remained in said Carter and Alling from said 11th day of June, 1897, until the 15th day of December, 1899, during the whole of which time the said Carter and Alling were continuously non-residents of, and absent from the territory of New Mexico, so that it was impossible to make valid service of process upon them or either of them in any suit against them, and this the plaintiff is ready to verify.

8. And for further replication to said second amended plea, plaintiff says that heretofore, to-wit on the 29th day of September, 1899, he began an action in the court of private land claims sitting in the district of New Mexico, and in said action, on the 19th day of December, 1899, he filed an amended petition by which the said defendant, the American Turquoise Company, was impleaded with others as a party defendant, as will appear by reference to said amended petition a copy of which is filed herewith and made a part hereof; that on the 16th day of January, 1900, an answer was filed in said former action by and on behalf of the defendant, the American Turquoise Company and another, a copy of said answer being

19 filed herewith and made a part hereof; that thereafter plaintiff prosecuted his said action in the court of private land claims and, upon appeal, in the Supreme Court of the United States diligently and without negligence, but failed therein from causes other than negligence in its prosecution, and that the present suit was commenced within six months thereafter; and this the plaintiff is ready to verify.

9. And for a further replication to said second amended plea, plaintiff says that defendant is not the owner of the land sued for by plaintiff nor of any portion thereof, and that defendant and those under whom it claims did not enter into the possession of the same lawfully or peaceably, nor have they remained in the continuous, exclusive, actual, peaceable, hostile, or open, possession of the same, continuously, under the color of title or in good faith, nor have they made large, lasting valuable improvements thereon, nor have they paid any taxes thereon lawfully assessed against the same, nor have they worked or operated the same openly, exclusively or continuously for more than ten years before the filing of this suit, and after the right to commence the same had come, fallen or accrued; and of this plaintiff puts himself upon the country.

10. And for a reply to a portion of the third amended plea, plaintiff says that the predecessors in title of plaintiff did not as early as the year 1839, or at any other time, abandon possession of said land, and that, after said time, they asserted their right to the possession and control over, and interest in the land included within

the boundaries of the land grant made to Joseph de Leyba in 1728, that being the property sued for; that from and after said time, said land did not remain vacant, unoccupied and unclaimed, and that plaintiff's predecessors in title have been in possession of the whole of the land included within the boundaries of said land grant, and that he is now in possession of a portion thereof; and that at the time the territory within which the property sued for lies, was ceded by the Republic of Mexico to the United States, the said land was vacant, unclaimed, unoccupied or abandoned by the predecessors in title of plaintiff; and of this plaintiff puts himself upon the country.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Plaintiff.

In the Court of Private Land Claims.

To the Honorable Court of Private Claims and the Chief Justice and Associate Justices thereof:

20 Your petitioner, Mariano F. Sena, resident of the City of Santa Fe, in the Territory of New Mexico, represents that he is the owner of that certain grant and tract of land lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the Jose de Leyba Grant, and bounded and described as follows, to-wit:

On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas, and on the north, by the lands of Captain Sebastian de Vargas.

Said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamante, on the 25th day of May, A. D. 1728, and the granting papers for the same are in the form of an absolute and perfect grant; the original papers of which said grant are now on file in the office of the surveyor general of the territory of New Mexico, and are not in the power, possession or control of your petitioner, said original papers being identified as Archive No. 441.

Said land has never been officially surveyed and your petitioner does not know the area thereof, but he has filed with his original petition herein, a sketch map of the same showing approximately according to the best information which your petitioner can obtain, the shape of said land and its location as far as possible; but the exact area and location and shape cannot be stated or ascertained until a survey thereof shall be made.

Your petitioner claims said land by conveyances from the heirs and assigns of the original grantee.

Your petitioner states that since the filing of his original petition herein, he has been informed that the owners of Los Cerrillos grant, the same being a confirmed grant and numbered 78 on the docket of this court, J. P. McNulty, L. Bradford Prince, Thomas Whalen,

Samuel Bromagem, Thomas Moore, Jr., Diego Mares, Bernard Carroll, Otto Zeigler, Albert Geyer, and American Turquoise Company, claim adverse possession to real estate included within the said Jose de Leyba grant otherwise than by the lease or permission of your petitioner, and he therefore makes said parties and company parties defendant to this amended petition, and asks that proper process issue for service on them.

Said claim to said land has not been confirmed nor has it been considered or acted upon by congress or any other authorities
21 constituted by law for the adjustment of land titles in the limits of said territory of New Mexico as acquired.

Your petitioner therefore prays that the validity of such title and claim and of said grant may be inquired into and decided by this Honorable Court and the same confirmed to your petitioner and the other heirs and assigns of said original grantee, and that he may have such other and further relief as the nature of the case requires and to your Honors may appear meet and proper.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Petitioners.

In the U. S. Court of Private Land Claims for the District of New Mexico.

General. No. 278.

MARIANO F. SENA

vs.

THE UNITED STATES, THE AMERICAN TURQUOISE COMPANY, J. P. McNULTY et al.

Now come the above named defendants, The American Turquoise Company and J. P. McNulty by Edward L. Bartlett, their attorney, and for their answer to the petition of the plaintiff filed herein deny that the said petitioner, Mariano F. Sena, is the owner of that certain land grant and tract lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant" by the boundaries therein set out.

They deny that said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamante on the 25th day of May, in the year A. D. 1728, or at any other time. And they deny that the granting papers for the same are in the form of an absolute and perfect grant.

And said defendants deny that said land has never been officially surveyed, but state the fact to be that a very large portion if not all of the said described land has been officially surveyed under the direction of the United States as public land of the United States
22 under the direction of the surveyor general of New Mexico, and for twenty years last past has been recognized by the United States and in its land office as such public land.

And said defendants deny that they claim adverse possession to real estate included within the said Jose de Leyba grant, otherwise than by the lease or permission of said petitioner, but they state to the court that they are now and have been for many years last past in the actual, exclusive, open and notorious possession of five mining claims with a superficial area of about one hundred acres of land in the southern part of Santa Fe county just north of the "Los Cerrillos" confirmed grant referred to in plaintiff's petition; that they have continuously worked and operated said mining claims which were located under the mining laws of the United States and the Territory of New Mexico and the rules and regulations of the United States in the said territory and have the final receipt for a patent to one of said mining claims, under proceedings to obtain a patent therefor; that they have paid the taxes levied and assessed against the said property; and that they and their grantees have enjoyed the exclusive undisturbed and quiet possession of the same for more than ten years last past.

Said defendants therefore pray that the proof of the denials and allegations contained in this their answer may be inquired of by the court.

THE AMERICAN TURQUOISE COMPANY, and J. P. McNULTY,
By EDWARD L. BARTLETT,

Their Attorney.

And afterwards, on May 20, 1904, there was filed in the office of said clerk, plaintiff's demurrer to a portion of the third amended plea of defendant, which is as follows:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA

VS.

THE AMERICAN TURQUOISE COMPANY.

Now comes plaintiff, and as to so much of the third amended plea of defendant, as is not denied in plaintiff's replication, says that the same is not sufficient in law to bar plaintiff from having and maintaining his action against defendant, and for causes of demurrer plaintiff specifies the following:

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1. Said plea is bad for uncertainty.
2. Said plea is not single, but is bad for multiplicity.
3. Said plea sets up no matter of legal defense to an action of ejectment.
4. The matters in said plea set forth, if of any avail whatever, cannot be properly pleaded in an action at law, but are purely of equitable jurisdiction.
5. Said plea attempts to set up mere laches as a defense to an action at law.
6. Said plea sets forth a public statute of the United States of which the court would take judicial notice.

7. Said plea sets out at length the instructions of the secretary of the interior to the surveyor general of New Mexico, and a notice issued by said surveyor general pursuant to said instructions, which are immaterial and irrelevant to anything which can be litigated in this case, but which, if they could be admissible at all, are mere matters of evidence and not of pleading.

8. Said plea attempts to set up in bar of plaintiff's action, failure of his predecessors in title to initiate proceedings before the surveyor general under the act of congress of 1854, although that statute imposed no such duty upon claimants to lands under the laws of Spain and Mexico, their rights being preserved and protected without such action on their part, by the treaty of Guadalupe Hidalgo and by said act of 1854.

9. Said plea sets up as a bar, the action of the United States in surveying the land in question in 1861, and in opening it to public settlement in 1885, coupled with the alleged failure of plaintiff's predecessors in title to assert their claim to the land before the surveyor general or other officer, although said plea does not show that the owners of the grant had any knowledge or notice of the action of the government, and as a matter of law, such action by the government could have no effect on the proprietary rights of the owners, and no duty was imposed upon the owners to assert their rights before any officer, and the courts of the territory were closed against them.

10. Said plea sets up the location and possession of alleged mining claims by defendant and its predecessors in title, their development and improvement, their sales and mortgage, the recording of such locations, sales and mortgages, all without protest or objection by plaintiff's predecessors in title, and that the courts and officers

24 of the territory of New Mexico, and of the United States, were open to and invited, and justice and common fairness and honesty required that the plaintiff and his predecessors in title should and must assert their claim to said land so as to apprise defendant and its predecessors in title and possession, all of which so far as its sets up any matter of fact shows no bar to this action at law, and so far as it attempts to set up matter of law with regard to the courts and the duties of plaintiff and his predecessors in title, is bad because not correctly stating the law, and also because facts only should be pleaded.

11. Said plea sets up that defendant and its predecessors in title and possession have complied with the laws relating to mining locations and the rules governing the location of mines in the Cerrillos Mining District, and have fully performed all work of development at large expense and paid all dues and lawful demands and made proofs thereof to the proper officers of the United States, all of which contains no statement of fact whatever, but mere conclusions of law, and is immaterial and irrelevant to anything which can be litigated in this cause.

12. The passage of the Act of Congress establishing the court of private land claims, the repeal of the 8th section of the act of congress approved July 22, 1854, the subsequent location of three mining claims by defendant's predecessors in title, the fact that no

notice of such locations was taken by any owner of the grant, the further fact that plaintiff obtained deeds from defendants of the original grantee in 1895, all of which is set up in said plea, cannot remotely tend to create any bar to the present action.

13. The assertion in said plea that the act of extending the public surveys over the land, and the filing of the plat of said survey in the Santa Fe land office, and the offering the lands to entry under the public land laws of the United States, constituted an entry and a resumption of the land by the United States, is a mere conclusion of law and an incorrect one.

14. The various proceedings which took place in the court of private land claims and in the Supreme Court of the United States in the course of the prosecution by plaintiff of his claim to the land included within the grant to Joseph de Leyba, and which are recited in said plea, cannot possibly constitute any defense or bar to the present action.

15. The alleged fact set up in said plea that no claim was made to the said grant until defendant had in good faith developed mines of great value, even if true, constitutes no defense to an action at law for the recovery of real estate, and as stated in said plea, would not be sufficient to give defendant any protection even in a court of equity.

16. Said plea is in many other respects vague, uncertain, ambiguous, irrelevant, involved, complicated, confused, insufficient, argumentative, not conformable to the declaration, and incapable of trial, and is wholly superfluous and unnecessary.

Wherefore plaintiff prays judgment of said third amended plea, and as to whether he should be required to make any other or further reply thereto.

H. S. CLANCY,
F. W. CLANCY,
Attorneys for Plaintiff.

And afterwards, on May 20, 1904, there was filed in the office of the clerk of said court, a demurrer to parts of plaintiff's replication, which said demurrer is as follows, to-wit:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA, Plaintiff,
vs.

THE AMERICAN TURQUOISE COMPANY, Defendants.

Ejectment.

Now comes the American Turquoise Company and to so much of such parts of plaintiff's replication as contained in paragraphs 2, 3, 4, 5, 6, 7 and 8 thereof, the same being replications to the second amended plea contained in the answer of the defendant, and demurs to them and each of them, and for separate grounds of demurrer to each of said pleas of replication assigns the following:

I.

First. That the second plea in said replication contained is not sufficient in law.

Second. That said plea does not contain sufficient facts which in law would preclude the defendant from having or maintaining said defense.

II.

26 First. That the third plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain the defense contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

III.

First. That the fourth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack directly or collaterally its legal capacity to have and maintain its defense as set forth in the second amended plea of its answer.

IV.

First. That the fifth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

V.

27 First. That the sixth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally, its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

Fourth. That the facts stated in the sixth plea of said replication constitute no lawful bar, impediment or disability on the part of this defendant to have and maintain the defenses contained in the second amended plea of its answer in this, that the facts set forth in said replication would not be availed of against this defendant except by the Territory in a proper proceeding upon its behalf.

VI.

First. That the seventh plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally, its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

Fourth. That the facts stated in the seventh plea of said replication constitute no lawful bar, impediment or disability on the part of this defendant to have and maintain the defenses contained in the second amended plea of its answer, in this, that the facts set forth in said replication would not be availed of against this defendant, except by the Territory in a proper proceeding.

VII.

First. That the eighth plea in said replication contained is not sufficient in law in this, to-wit:

28 1. That the facts therein stated constitute no disability or impediment on the part of this plaintiff to the proper prosecution of whatever rights this plaintiff may have to recover the possession of the property properly sued for in the proper tribunals of the Territory.

2. That the same does not fully set forth the facts and proceedings had in the court of private land claims, so as to constitute any lawful excuse for delay in prosecuting his said suit for the possession of said property in the proper courts of the Territory.

3. That the facts therein stated are incomplete and insufficient to constitute an interruption of the running of the bar of the statute of limitation against him and those under whom it claims.

4. That the facts therein stated does not show: (a) that suit was

ever instituted by plaintiff against this defendant for the recovery of said property, and that the same was dismissed without judgment upon the merits, and suit reinstituted within six months thereafter, so as to constitute a bar of the statute set up by defendant in its second plea contained in its amended answer; (b) that the facts therein stated do not show that said action in said court of private land claims was for a recovery of the possession of said property, or was of the same nature and character, or between the same parties.

Wherefore, defendant prays judgment as hereinbefore prayed in its amended answer filed herein.

THE AMERICAN TURQUOISE
COMPANY,
By EDWARD L. BARTLETT,
MATT. G. REYNOLDS,
Its Attorneys.

And afterwards, to-wit, on the 30th day of May, 1905, there was made and entered of record in said cause, the following order:

In the District Court, Fourth Judicial District, County of San Miguel, Territory of New Mexico.

No. 5834.

MARIANO F. SENA
vs.
THE AMERICAN TURQUOISE Co.

Ejectment.

This cause having heretofore come on to be heard upon the demurrer to so much of the third amended paragraph of the
29 defendant's answer as is not denied by the plaintiff's replication, and the court having heard Frank W. Clancy, Esq., attorney for the plaintiff, and Stephen B. Davis, Esq., attorney for the defendant, and being fully advised in the premises, does hereby overrule the said demurrer, to which ruling of the court the plaintiff by his attorney excepts; and, at the same time the demurrer filed by the defendant to parts of the replication filed by the plaintiff having come on to be heard, and the court having heard Stephen B. Davis, Jr., Esq., attorney for the defendant, and Frank W. Clancy, Esq., attorney for the plaintiff, and being fully advised in the premises, does hereby sustain the said demurrer, to which ruling of the court the plaintiff by his attorney duly excepts.

Las Vegas, N. M., May 26th, 1905.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards, to-wit, on August 5, 1905, there was filed in the office of said clerk, the replication of plaintiff to the third amended plea of defendant, which is as follows, to-wit:

In the District Court, County of San Miguel, Territory of New Mexico.

MARIANO F. SENA

vs.

THE AMERICAN TURQUOISE COMPANY.

Now comes the plaintiff by his attorneys, and by way of replication to so much of defendant's third amended plea as he has not heretofore replied to, admits that Congress of the United States passed an Act, approved July 22, 18-4, such as is described and set out in said plea, and that the secretary of the interior in the exercise of authority conferred upon him by said act, issued instructions to the surveyor general of New Mexico which were, in part, as set forth in said plea, and that thereafter the surveyor general of New Mexico issued and gave notice to the inhabitants of New Mexico, as set forth in said plea, and that said act of congress and said instructions remained in force until March 3, 1891; but plaintiff denies that said act of congress, instructions and notice imposed upon him or his predecessors in title any active duty with regard to the assertion of

his or their claims to the land in question before the office of
30 said surveyor general, and he avers that, on the contrary, under said act of congress and instructions, it was the positive active duty of said surveyor general to ascertain the origin, nature character and extent of the claim for land under the said grant to Joseph de Leyba made in the year 1728, and to make a full report thereon, with his decision as to the validity or invalidity of the same, and that if he had performed his duty in the premises, he would have found full and complete documentary evidence in the Spanish archives relating to grants of land by the former authorities of the country as to the origin, nature, character and extent of the said grant. Plaintiff denies that the United States in the year 1861 caused the public surveys to be extended over the said grant as vacant, unoccupied and unclaimed land, and as public land belonging to the United States, although he admits that the United States did cause the said land to be surveyed under the laws relating to public surveys; and he admits that the said survey was withheld, as stated in said plea from the local United States land office at Santa Fe for nearly 24 years after the survey was made, and he states the fact to be that said survey was so withheld for nearly a quarter of a century because it was a well known and notorious fact that the said land and other lands which were surveyed at the same time, were claimed under the said Leyba grant and other grants from the Spanish government. Plaintiff denies that during all this time, and for any time prior to the treaty of Guadalupe Hidalgo, neither his predecessors nor any one of them, claimed, asserted or possessed said lands, and denies that they in no manner gave any notice of said claim or right thereunder; and he denies that on or about April 1, 1885, one M. K. Parmaly entered upon or in the possession of the Castilian Quartz Lode mining claim or gave any notice thereof on June 22, 1885, or at any other time; and he denies that on or about the 21st day of

January, 1890, Pedro Muniz and Faustin Muniz entered upon and took possession of the Muniz Mine, or gave any notice thereof; and he denies that on or about the 21st day of June, 1891, one J. M. Allen entered upon or took possession of the Morning Star Lode, or gave any notice thereof; and he denies that on or about the 2nd day of June, 1891, C. G. Storry entered upon or took possession of the Gem Lode, or gave any notice thereof; and he denies that on

31 or about the 2d day of November, 1891, one C. G. Storry entered upon or took possession of the Sky-Blue Turquoise Lode, or ever gave any notice thereof; and plaintiff denies that defendant's predecessors in title or the defendant, commencing in the year 1885 and continuously down to the present time, have made valuable improvements or developed said mines and mining claims, or spent large sums of money thereon, or in the development thereof, and he denies that he or his predecessors in title have permitted said mines or property to be bought in open market or have permitted the same to be mortgaged, as in said plea alleged; and he denies that the courts or offices of the Territory of New Mexico or of the United States, were open to or invited, or that justice or common fairness or honesty required, that he or his predecessors in title should or must assert their claim or claims to said lands. Plaintiff further denies that defendant and its predecessors in title or possession, have in any respect complied with the laws of the United States or the Territory of New Mexico, relating to mining locations or the rules governing the locations of mines in the Cerrillos Mining District of Santa Fe county, New Mexico, or that they have fully performed any work or development at large expense, or paid any due or lawful demands or made any necessary or proper proofs thereof to the officers of the United States.

Plaintiff admits that the Congress of the United States on March 3, 1891, passed an act establishing the court of private land claims, as pleaded in said plea, but he denies that the mining claim called the Morning Star Lode, the Gem Lode, and the Sky-Blue Turquoise Lode, were located or filed upon or possession thereof taken, by the predecessors in title of defendant, and he denies that the said land grant or the land covering the said mining locations, was vacant, unoccupied or abandoned, and he denies that large sums of money were being expended for labor and material, improvements and development of said mining claims.

Plaintiff admits that in the year 1895, he obtained from two lineal descendants of the said Jose de Leyba, deeds for their interests in the said grant, but he denies that said deeds were obtained for a nominal consideration, as in said plea alleged; and he denies that up to that time no descendants, heir, or other person had asserted claim or had pretended to claim any right, title or interest under said grant, or had made no claim or asserted no right thereto; and he denies

32 that by the act of congress extending the public surveys over said land or by the filing of the plat of such survey in the United States land office at Santa Fe, and offering the same to entry under the public land laws, there was any entry or a resumption of said land by the United States.

Plaintiff admits that he filed a *petition*, and afterwards an amended petition in the court of private land claims, as in said plea set forth; and he admits that J. P. McNulty and the American Turquoise Company filed their answer to said amended petition, as in said plea set forth, and that the United States also filed its answer as in said plea set forth; and that said court of private land claims dismissed plaintiff's petition, and that he, the said plaintiff prayed an appeal to the Supreme Court of the United States, which was allowed, and that the said Supreme Court of the United States affirmed the decree of the court of private claims and afterwards modified the decree of affirmance, as in said plea set forth.

Plaintiff denies that during all this time, long prior to the treaty of Guadalupe Hildago, no descendant, heir or other person save defendant, had possession of any portion of the land included within the land grant of Jose de Leyba in 1728, and he denies that such possession was abandoned prior to the cession of this territory to the United States.

All of which the said plaintiff is ready to verify. Wherefore he prays judgment against the said defendant as in and by his declaration herein he has already prayed.

H. S. CLANCY,
F. W. CLANCY,
Attorneys for Plaintiff.

And afterwards, to-wit, on September 2, 1905, said cause coming on for trial, the following proceedings were had, to-wit:

MARIANO F. SENA
vs.
AMERICAN TURQUOISE COMPANY.

Now comes the plaintiff by his attorneys, F. W. Clancy and H. S. Clancy, and the defendant comes by its attorneys, M. G. Reynolds and S. B. Davis, Jr., and issue having been joined between the parties, thereupon comes a jury, which being duly sworn to try the issue joined between the parties, after hearing the evidence and the
33 arguments of counsel, by direction of the court returns a verdict of not guilty; whereupon the plaintiff gives notice of a motion for a new trial.

And afterwards, on September 4, 1905, there was filed in the office of said clerk, plaintiff's motion for a new trial of said cause, which motion is as follows, to-wit:

In the District Court, San Miguel County, Territory of New Mexico.

No. 5834.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Now comes plaintiff by his attorneys and moves the court to set aside the verdict heretofore rendered herein, and to order a new trial of this cause for the following reasons:

1. The court erred in admitting improper evidence on behalf of defendant.

2. The court erred in excluding proper evidence on behalf of plaintiff.

3. The court erred in directing a verdict for defendant.

4. The court erred in holding that the title of plaintiff was imperfect.

5. The court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

6. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

7. The verdict is contrary to the evidence.

8. The verdict is contrary to the law.

9. The verdict is contrary to the weight of the evidence.

10. The court erred in refusing to instruct the jury to find in favor of the plaintiff.

11. There is no evidence to support the verdict.

12. The court erred in holding that plaintiff could not recover unless he had a perfect title to the land in controversy.

13. The land in controversy, included in the alleged mining claims of defendant, was, by the uncontradicted evidence, shown to be within the boundaries of the grant to Jose de Leyba.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Plaintiff.

34 And afterwards, on September 4, 1905, there was filed in the office of said clerk, plaintiff's motion in arrest of judgment, which motion is as follows, to-wit:

In the District Court of the Fourth Judicial District of the Territory of New Mexico, Sitting Within and for the County of San Miguel.

No. 5834.

MARIANO F. SENA
VS.
AMERICAN TURQUOISE COMPANY.

Ejectment.

Now comes the plaintiff by his attorneys and moves the court to arrest the judgment on the verdict heretofore rendered herein, for the following reasons:

1. The court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

35 8. The issue tendered by the replication numbered 10, to part of the third amended plea, was an immaterial issue.

9. The court erred in overruling plaintiff's demurrer to portions of the third amended plea, thus forcing plaintiff to reply to those portions.

10. The issue tendered by the replication to the portions of the third amended plea, previously demurred to, was an immaterial issue.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Plaintiff

And afterwards, on September 4, 1905, there was made and entered of record, a final judgment in said cause, in the words and figures following, to-wit:

In the District Court of the Fourth Judicial District, Sitting Within
and for the County of San Miguel.

No. 5834.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Ejectment.

Now comes the plaintiff by his attorneys, F. W. Clancy and H. S. Clancy, and moves the court for reasons set forth in his motion on file to set aside the verdict of the jury heretofore rendered herein and grant him a new trial of this cause, and said motion being submitted to the court, is denied; It is therefore ordered by the court that said motion be and the same hereby is denied. Whereupon defendant by his attorneys moves the court to arrest the judgment upon the verdict heretofore rendered herein for reasons set forth in his motion on file, and said motion being submitted to the court, is denied; It is therefore ordered by the court that said motion be and the same hereby is denied. Whereupon it is considered and adjudged by the court that the said defendant American Turquoise Company go hence without day and recover of the plaintiff Mariano F. Sena its costs in this behalf expended to be taxed and that it have execution therefor.

W. J. MILLS,

Chief Justice, Etc.

Sept. 4, 1905.

And afterwards, on the 30th day of August, 1906, there was filed
in the office of said clerk, plaintiff's bill of exceptions in said
36 cause, which is in the words and figures following, to-wit:

In the District Court for the Fourth Judicial District, Territory of
New Mexico, County of San Miguel.

No. —.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Ejectment.

Be it remembered that on the trial of the above entitled cause beginning on the 28th day of August, 1905, before the Honorable William J. Mills, Judge of said District Court, and a jury, the plaintiff being represented by Messrs. Frank W. Clancy and Harry S. Clancy, and the defendant by Messrs. Matt G. Reynolds and Stephen

B. Davis, Jr., the following proceedings were had and evidence given, as follows:

Plaintiff's Case.

Mr. F. W. CLANCY: I will first offer in evidence, Archive No. 441, of the surveyor general's office of New Mexico, and present a translation of the document.

(The same was marked for identification Plaintiff's Exhibit A.)

Mr. REYNOLDS: I desire to object to the admission of this document in evidence for the reason it shows on its face that it was a grant for a small tract of land—4.41-100 acres, lying within the out-boundaries as given in a grant, and therefore, if the total area contained in the grant were given to the parties, it would not cover as much property as is contained in these mining claims, which amounts to thirty-one acres, and that the alleged act of juridical possession does not contain a description of the boundaries of the grant; does not recite them, and that therefore the land they were put in possession of under the juridical act was not given in the act itself, and an act of possession to be an act of juridical possession must describe the property by boundaries, either by natural objects or by such a name as will enable the party with the act of juridical possession to go and identify the property without further act or information; and secondly, it does not appear that this act of juridical possession, the grant, or the petition subsequent to the
37 alleged act of possession was ever approved by any higher authority. It is contended by the defendant that in order for this title to be a perfect title, that it must be approved by some other authority than the granting officer, and that it does not appear in these papers, and it should appear on the papers, and unless it can be shown otherwise, that it received the approval of some higher authority than the Provincial officer making the grant, that it is not a perfect grant.

Mr. F. W. CLANCY: In view of part of the objection, I amend the offer so as to offer in evidence the original archive in Spanish as well as the translation, and the two papers can be marked Plaintiff's Exhibit A. The reason I do that is on account of the question of the exact meaning of the Spanish words "as to the quantity of land."

Mr. REYNOLDS: I desire to offer the further objection as suggested by Mr. Davis, that there is no proof of the authenticity of the genuineness of the signature of the officer, and particularly his power to make a grant, of this character, and that there is no proof he was the governor at the time, or that he had any authority to make the grant. I make that additional objection, to the other, suggested by counsel, so as to preserve the record.

Mr. F. W. CLANCY: That is purely a matter of law—it is for the court to say.

Mr. REYNOLDS: It might be suggested now, in an action of this character between private parties in the local courts, whether the court will take judicial notice of the laws of Spain and Mexico, and

it will be a matter that the court will have to pass upon. In passing upon the authority of the governor to make this character of grant, it is true the supreme court of the United States and the court of private land claims have held especially in actions with the government on confirmations of claims, that the laws of the former government under which the grant was made became for the purposes of the case domestic laws, of which the court will take judicial notice, but whether or not in an action of this character the court will take judicial notice of them, is another question, and therefore I make the objection.

Mr. F. W. CLANCY: The decisions of the supreme court of the United States on that point are that the courts take the same judicial notice of the laws of the former government when they arise in any form of action, public or private, civil or criminal, that they would of our own laws.

38 The COURT: Whether this man was the governor or captain general I suppose you can prove that.

Mr. CLANCY: There is nobody now here who saw him when he was acting in that capacity.

I desire to have the record show that this archive No. 441, is of one of the original archives found among the Spanish papers at the time of the organization of the office of surveyor general. That, I understood Mr. Reynolds to say—is the fact.

Mr. REYNOLDS: I am not admitting anything so far as the record is concerned. There is no doubt about the fact that archive No. 441 was found by the surveyor general in the archives, to be perfectly frank to counsel and court, about it, in the year 1855. The question of power to make it and of the officer is another question.

Mr. Reynolds: I suggest to the court that in the translation of the document there is not much variance, except as to the description of the property, and the translation we propose to submit to the court is a translation made by Mr. William M. Tipton, who gave it a careful examination and a very careful translation. As far as the court is concerned, when the original document is offered in evidence, if the court is not satisfied with the translation, it may have one made to suit the court. I do not know how that can be done.

The COURT: I will admit the original Spanish document, subject to the exception of the defendant.

Mr. CLANCY: I submit my translation for the consideration of the court, and if counsel desires to submit another translation, he may do so.

Mr. REYNOLDS: Very well, we will take it up when we come to it.

The original Spanish document was here marked Plaintiff's Exhibit A, and the translation was read to the court and jury as follows:

City of Santa Fe, May 29, 1728, before the governor and captain general of this kingdom, there was presented this petition with its contents:

Joseph de Leyba, resident of the city of Santa Fe, appears before Your Excellency in due legal form, and state that in accordance with the royal ordinances of His Royal Majesty, I record a piece

of lands and woods, uncultivated and unsettled, which includes a half a fanega of corn-planting land, a little more or less, which is bounded on the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan García de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

Therefore, I ask and pray, in all humility that Your Excellency be pleased to make me in the name of His Majesty, a grant for the said piece of land, for myself and my children, heirs and successors, and that the act of royal possession be executed to me whereby I will receive benefit and favor as well as justice which I seek. And I swear in due form that this my petition is not made in malice and as it may be necessary, etc.

JOSEPH DE LEYBA.

Grant.

This petition was presented by the petitioner to his excellency, the governor and captain general of this province, and being examined by His Excellency, he treated the same as before him, and in consideration of the prayer of the party His Excellency directed the chief alcalde of the city of Santa Fe to proceed to the spot referred to by the party, and inspect the land he applies for with citation to the adjoining settlers; and there being no prejudice resulting to any third party having a better right, I do make, and in the name of His Majesty (God preserve him) the grant for the land the petitioner prays for, with the condition that he settle the same within the term prescribed by the royal ordinances, into the royal and personal possession of which land said chief alcalde will place the party, and will place the act of possession at the close hereof.

Thus His Excellency aforesaid decreed, commanded and signed before me the present secretary of state and war. To which I certify.

BUSTAMANTE.

By command of his excellency, the gov. and capt. gen'l.

ANTONIO DE GIVUSAYA,

Secretary of State and War.

Act of Possession.

At the city of Santa Fe, on the 25th day of the month of May, in the year one thousand seven hundred and twenty-eight, before me, Capt. Diego Arias de Quiros, chief alcalde and war capt. of the said city, acting as special commissioner with the undersigned my attending witnesses; in execution of the above decree made by His

Excellency Juan Domingo de Bustamante, gov. and capt. gen'l, I proceeded to give the possession prayed for by Jose de Leyba in his petition. I arrived at the place and applied for by the petitioner, taking with me Juan Manuel Chirinos and Capt. Sebastian de Vargas and having inspected the land and woods prayed for by the said petitioner, I took him by the hand in the

presence of the parties mentioned, performing the customary ceremonies, and he plucking up grass, casting stones, and shouting aloud in sign of ownership, I placed him in royal possession, in the name of His Majesty (God preserve him); so that in his name and royal word, he, the party aforesaid and his children and heirs may enjoy the same. In testimony whereof I sign this as special justice with the undersigned my attending witnesses for lack of a public or royal notary, there being none in this province, and on this common paper as there is no stamped paper in this section. I certify.

DIEGO ARIAS DE QUIROS,
Special Justice.

JUAN MANUEL CHIRINOS.
JUAN JOSEPH LOBATO.

Mr. CLANCY: I now offer in evidence Archive No. 572, from the surveyor general's office, which is a deed from Jose Castellanos to Miguel Garcia de las Rivas, dated August 12th, 1701, of which we present a copy and translation, (handing same to court).

The deed and translation were marked for identification Plaintiff's Exhibit B.

Mr. F. W. CLANCY: I was offering it in this order because it chronologically came that way,—it is for the purpose of establishing the location of the lands called for in the petition for this grant as the western boundary.

Q. State what is was

Mr. REYNOLDS: We object to it for the reason it is not the proper way to show the location of the western boundary of this grant, and secondly, as appears, it has no reference to it one way or the other—the location of this grant is an important matter of controversy, and it is an improper way of proving the location or ancient boundaries of a land grant by a deed of this character, made long prior to the making of this grant.

The COURT: What is the date of the deed?

Mr. CLANCY: 1701.

Mr. DAVIS: With the permission of the court, I desire to make the additional objection, that the instrument the gentlemen
41 seek to introduce, the effect of it is the declaration of the grantor in that instrument as to the boundary of the land in controversy here, and that there is no proof, either that the person who made that declaration or the grantor in the deed was at the time the owner of adjacent land, nor is there any proof that he was at that time in possession of the adjacent land. As I understand the rule which allows hearsay for the purpose of proving boundaries, it is that statements made by persons now dead, are admissible in proving the boundaries, provided the persons making the statements were either the owner of the land about which they state, or were in the actual possession of it, or rather, they must be both the owner and in possession to make their full declarations admissible.

Mr. F. W. CLANCY: That rule does not have any application to deeds made 204 years ago.

Objections overruled.

Exception reserved by defendant's counsel.

The deed was here marked Plaintiff's Exhibit B, and the translation read to the court and jury, as follows:

(Translation.)

Royal sale of La Cienega in favor of Miguel Garcia de la Riva, 1701.

At the villa of Santa Fe on the twelfth day of the month of August of the year one thousand seven hundred and one, before me Joseph Rodriguez, alcalde ordinario of the second vote of this said villa, there being no public or royal notary (escrivano) in this kingdom, nor within a radius of more than two hundred and seventy leagues, acting as juez receptor with two attending witnesses, appeared Joseph Castellanos, resident of this said city, and said that he was giving and gave in royal sale the sitio of the old pueblo of the Zienega, which he bought from the royal ensign Domingo de la Barreda, to whom it had been sold by the same person in whose favor this deed is executed, who is Miguel Garzia de la Riba, with the grant which the General Don Diego de Vargas made to Bernebe Jorje in name of His Majesty, of whom he had it by royal sale, the said Miguel Garzia, for the price of two hundred dollars of the money of the country which is to be paid by the month of January of the coming year one thousand seven hundred and two and renounces the laws of non numerata pecunia and those of the Duobus res de Vendi, and the autentica pre fide iuroribus, so that as his own property, the said Sitio de la Cienega, he can exchange and transfer it or use the same at his pleasure, and empowering the courts of His Majesty with all rigor of law to compel him to comply with the provisions contained in this document, and if the said Jose Castellanos should at any time bring suit, he shall not be heard in court or out of it, and as a guaranty he pledges his person and real and personal property. To have and to hold he so executed and signed the same together with myself and my assisting witnesses who were Joseph Antonio Romero and Domingo de la Barreda, and at the request of the parties I delivered the original of this, and left a copy thereof in my possession written on ordinary blank paper, there being no sealed paper in these parts.

JOSEPH CASTELLANOS.

Assisting witness:

DOMINGO DE LA BARREDA.

Assisting witness:

JOSEPH ANTONIO ROMERO.

Before me as special judge:

JOSEPH RODRIGUEZ.

This copy agrees with its original which I, Joseph Rodriugez, alcalde ordinario of the second vote of this city, have copied to the letter, and it is true and correct in one leaf of ordinary blank paper, there being no sealed paper in these part, and that it may so appear, I sign it in this city of Santa Fe on the twelfth day of August, one thousand seven hundred and one.

In testimony whereof, I have affixed my customary signature.

JOSEPH RODRIGUEZ.

(Indorsed:) Royal sale of La Cienega in favor Miguel Garcia de las Rivas in the year 1701.

Mr. F. W. CLANCY: I desire to call a witness before I introduce this next paper.

ANDRES C. DE BACA sworn.

Direct examination by FRANK W. CLANCY.

Q. What is your name?

A. Andres C. de Baca.

Q. Where do you reside?

A. In the county of Santa Fe, New Mexico, Prec. No. 6.

43 Q. In what part of the county do you live?

A. Precinct No. 6.

Q. What is the name of that place? How is it usually known?

A. Known by the name of "Cienega."

Q. How long have you lived there, at Cienega?

A. Since 1881.

Q. Examine this paper and state whether you have ever seen it before?

A. Yes, sir; I have seen it.

Q. It is the same paper you and I were looking at together this morning?

A. Yes, sir.

Q. In whose possession was that paper?

A. This paper was in the possession of Nasario Gonzalez.

Q. Where did he live?

A. At Cienega, Santa Fe county.

Q. Is he now living?

A. He is dead.

Q. Do you know how long he lived at La Cienega

when he died.

Q. Was he, or not, the owner of land at that place?

A. He used to own most of the land there at "Cienega."

Mr. CLANCY: I desire to prove this paper came from the proper custody. That this deed was found among his papers.

Mr. REYNOLDS: I understand he says that it was obtained from Nasario Gonzales—or had been in his possession.

Mr. DAVIS: I object to the last question of Mr. Clancy, and move to strike out the answer of the witness as to whether or not Nasario

Gonzales was the owner of land in that vicinity as calling for the conclusion of this witness.

Objection sustained by the court, and answer stricken out.

Mr. CLANCY: I will put the question in another form.

Q. Was he or not to your knowledge in possession and claiming ownership of lands at La Cienega?

A. Yes, sir; he was.

Q. To any considerable extent or a small amount of land?

A. He owned most of the land there at Cienega.

Q. Did anything ever take place to specially call your attention to this paper which I have just shown you?

A. Yes, sir.

44 A. Some years ago they had a law suit in regard to that land and I made a copy of all these old papers, a copy and translation of all the old papers he had in his possession at that time.

Q. Was this or not one of those papers which you copied and translated?

A. Yes, sir; it was.

Q. State whether or not the land of which Nasario Gonzales was in possession was inside of the boundaries mentioned in that old paper?

A. Most of the land he owned was within the boundaries of the land mentioned in this paper.

Q. Are you personally acquainted with the objects mentioned in that deed as boundaries?

A. Yes, sir; I am.

Q. Can you state approximately about the time that you made the copy and translation of this deed?

A. I think during the year 1884 or 1885. I am not exactly certain. I don't remember exactly what year it was.

Mr. CLANCY: I now offer this old deed in evidence and file a typewritten copy and translation; the same was here marked Plaintiff's Exhibit C, and the translation read to court and jury as follows:

PLAINTIFF'S EXHIBIT C.

(Translation.)

At the Villa of Santa Fe on the twelfth day of March, one thousand seven hundred and four, before me Captain Juan Paez Hurtado, war lieutenant and captain-general of this Kingdom, acting as Juez Receptor with two attending witnesses, appeared Miguel Garcia de la Riba, resident of this city, and said that he was giving and gave in royal sale, the sitio of the old Pueblo of Zienega, in favor of his son, Juan Garcia de la Riba, for the price of one hundred dollars of the money of the country, that said Miguel Garcia de la Riba had by sale from Joseph Castellanos, and that its boundaries are on the north the water-shed of La Zieneguilla, on the east the Penasco Blanco (white rock) de las Golondrinas, on the south the canada of

Juana Lopez, on the west las boquillas, and renounces the laws of *non numerata pecunia* and those of the *dubus res de vendi* and *autentica pre fide jurobus* so that as his own property, the said grant of the old Pueblo of Zienega, he can exchange and
 45 transfer it or use the same at his own pleasure, and empowering the courts of His Majesty with all rigor of law to compel him to comply with the provisions contained in this document, and that if at any time he should bring suit, the said Mgl. Garcia de la Riba, he shall not be heard in court nor out of it, and as a guaranty he pledges his person and real and personal property he may now have or might have; and the said Miguel Garcia de la Riba further states that of the remainder he makes, grants, gives and donates pure and perfect which the law calls *intervivos*. To have and to hold he so executed and signed the same the said grantee Miguel Garcia de la Riba, together with myself and my assisting witnesses who were Mateo Truxillo and Jose Franco de la Barreda, both citizens (torn) of this city, and of (torn) the party I delivered this orig (torn) in the power of the purchaser (torn) on ordinary blank paper (torn) there being no sealed paper (torn) parts.

MGL. GARCIA DE LA RIBA.

Testigo de asistencia:

JOSEPH FRANCO DE LA BARREDA.

Ante mi como Juez Receptor.

JUN PAEZ HURTADO.

Testigo de asistencia.

MATEO TRUGILLO.

Mr. REYNOLDS: I object on the same ground as to the other documents and on the further grounds that the recitals in this paper does not locate the boundaries, nor does it have any reference to or locate the boundaries of the original grant. I suppose it is offered for the purpose of showing the location of one of the "calls" of the grant made in 1728.

Mr. CLANCY: To show the location of the lands of Juan Garcia de las Rivas.

Mr. REYNOLDS: I think it is as indefinite as the location of the original grant itself.

The COURT: I will allow it to go in evidence.

Objection overruled.

Exception reserved by defendant's counsel.

Mr. F. W. CLANCY to witness:

Q. Now, Mr. Baca, do you know where the water-shed or *caidos* of the Cienega is on the earth's surface?

A. Yes, sir.

Q. What relation to the house of Nasario Gonzales, in
 46 which direction—the house in which he formerly lived—in which direction is the water-shed?

A. North of the house of Nasario Gonzales.

Q. About how far would you say it was from the house to the water-shed?

A. To the divide.

Q. Yes, sir.

A. It must be about a mile and a quarter, more or less.

Q. Do you know where the Penasco Blanco de las Golondrinas is on the earth's surface?

A. Yes, sir.

Q. About how far is that from the house in which Nasario Gonzales formerly lived?

A. About one-half a mile.

Q. In what direction from the house?

A. North.

Q. Is it due north—or west or east of north?

A. A little west of north.

Q. Do you know where the Canada of Juana Lopez is?

A. Yes, sir; I do.

Q. Where is the Canada Juana Lopez?

A. It is south of Nasario Gonzales's house—a little west of south of Nasario Gonzales's house.

Q. In what direction does the Canada of Juana Lopez run?

A. At the beginning it runs west, and then it turns north.

Q. Do you know where the Old Delgado Ranch and what is called Pino's ranch, are?

A. Yes, sir; I do.

Q. How are they situated with reference to the Canada Juana Lopez?

A. The Delgado Ranch is east of the Canada de Juana Lopez and the Pino ranch.

Q. That valley called the Canada de Juana Lopez—I want to know where these places are with reference to that canada—are they in it or outside of it?

A. They are inside of the Canada.

Q. In that Canada is there any water or stream?

A. Yes, there are some springs there.

Q. Are you acquainted with what is called Las Boquillas?

A. Yes, sir.

Q. What are the Boquillas?

47 Q. They call the hills where the Santa Fe Creek or the Cienega Creek and the Juana Lopez Creek join, the Boquillas—there is a table land there to the north and land to the south.

Q. That is where the water of these streams enters the canyon?

A. Yes, sir.

Q. How long have you known these natural objects about which I have asked you by these names—Penasco Blanco, Canada de Juana Lopez and Las Boquillas?

A. I have known them since I was about 9 or 10 years old.

Q. And how old are you now?

A. I will be 56 years old the last day of November.

MR. REYNOLDS: I enter an objection and move to strike out the testimony of the witness, and enter the further objection to the in-

roduction of this deed on the ground that it raises a collateral issue in the case as to the location of this grant or location of the land described in the petition, and does not aid in locating the western boundary of the grant in question, and it is not the proper way or manner of locating the boundary of a grant or the boundary of a property.

Objection overruled by the court.

Exception reserved by defendant's counsel.

Cross-examination by M. G. REYNOLDS, attorney for defendant:

Q. You say you know where the Delgado Ranch is?

A. Yes, sir.

Q. How far south of Nasario Gonzales' house is it?

A. It must be from the house of Nasario Gonzales to the line of the Delgado Ranch, about a mile and a quarter, to the northern boundary of the Delgado Ranch.

Q. I am speaking now of the ranch house of the Delgado Ranch, and the corrals.

A. There are corrals there and a house, too.

Q. How far is Nasario Gonzales' house from those ranch houses?

A. About a mile and a half more or less.

Q. How was it—directly south?

A. South of the house of Gonzales.

Q. Almost directly.

A. Not exactly. The old Delgado house must be a little west of south from Don Nasario Gonzales' house.

Q. Do you know where the Juana Lopez Creek is?

A. Yes, sir.

48 Q. Is that what you call the Canada Juana de Lopez?

A. Well, the creek runs right inside the canada.

Q. How long is that Canada de Juana Lopez? The canada proper.

A. What I have known as the Canada Juana Lopez from the Delgado boundary down must be about a mile and three-quarters, more or less.

An adjournment was here taken until 2 p. m., Monday August 28th, 1905.

(Afternoon Session, Monday, Aug. 28, 1905.)

ANDRES C. DE BACA (recalled).

Direct examination by Mr. F. W. CLANCY:

Q. Have you seen this map before and had an opportunity to examine it (handing witness map).

A. Yes, I saw it before.

Q. From your knowledge of that part of the country, can you state whether or not that map shows with approximate accuracy the location of the Penasco Blanco, the house of Nasario Gonzales,

the Canada de Juana Lopez and the north boundary of the lands of the Cienega—the old road from Cerrillos to Pecos and the San Marcos road?

Mr. REYNOLDS: This is not a suit in the court of private land claims—but it is a suit in ejectment. The party must prove his property and title by evidence in proper form and the attempt to make that map an approximate map of the location of objects in that country in the manner in which it is done is improper and no foundation has been properly laid. The map should have been laid down to some scale and by some surveyor who could locate the lines accurately, because it might arise that the running of these lines might leave this property out and might not. The attempt to establish the lines and get the approximate location of these objects by testimony of that kind is incompetent.

Mr. CLANCY: If I should ask him to take a pencil and make a plat, he could do it. The weight and credibility of his evidence is entirely a different thing from the question of competency. If I have a plat already made, I can submit it to a man familiar with the country and ask him as to whether it is accurate or not, so far as he can say, and that is what I am attempting to do in this case.

The COURT: Answer the question Yes or No.

(Mr. CLANCY to witness:)

Q. Can you tell whether or not that is an accurate map
49 from your knowledge of the country?

A. From my knowledge of the land it seems to be a correct map of the place.

Q. Are you acquainted with the old road which runs from the Cerrillos to Pecos?

A. Yes, sir; I am.

Q. Are you acquainted with what is called the "San Marcos road"—the road from Santa Fe to the San Marcos Springs?

A. Yes, sir.

Q. Are these roads shown correctly on that map?

A. They seem to be correctly shown.

Cross-examination by Mr. REYNOLDS:

Q. What do you call the San Marcos road?

A. It is the road leading from Santa Fe through the Springs of San Marcos to go to Dolores and Golden.

Q. How long have you known that road?

A. Since 1869 I have known that road.

Q. Has it ever changed in the meantime?

A. Not to my knowledge.

Q. Substantially where it was in 1869?

A. I think it is about the same place where it was then.

Q. You don't know where it was before that time?

A. No, I do not know where it was before that time.

Q. That is what they call the San Marcos road now and in 1869?

A. They used to call it the San Marcos road at that time, and they call it so yet.

Q. Does it run right down by San Marcos?

A. It runs to the Spring of San Marcos. It don't run in a straight line from here to San Marcos, but it goes right by the spring.

Q. The spring is right in the San Marcos pueblo grant?

A. Yes, sir.

Q. How does the road run when it reaches the San Marcos spring?

A. Just before it gets to the spring it runs a little west of south.

Q. Do you know where the boundaries of the San Marcos pueblo grant are—in a general way?

A. Yes, sir; I know.

50 Q. How does the road run when it strikes the San Marcos Pueblo Grant?

A. When it strikes the northern boundary of the grant?

Q. Yes, sir; or whatever boundary it does strike, if it strikes it at all?

A. It runs almost due south.

Q. The San Marcos Pueblo Grant is nearly in the form of a square?

A. Yes, sir.

Q. How does it run when it passes the boundary line—does it come from the east or north up to it?

A. It comes from the northeast or a little to the east of north.

Q. About where does it make that turn, or does it make a turn?

A. I could not exactly tell about that.

Q. The road then runs in a southeasterly direction about three-fourths of the way, does it not?

A. It runs south after it leaves the town here for about eight miles. It runs almost south, and then it turns a little west of south.

Q. You have examined this map, have you?

A. Yes, sir.

Q. You say this map correctly locates the roads and places and you say the San Marcos road is substantially located on this map correctly?

A. To my knowledge it is.

Q. See if that is correct as to the San Marcos road on that map—See if it don't make a turn to the west in order to take it on that map what they call the "Cuesta del Oregano?"

A. (Looking at map.) Yes, sir.

Q. Then it starts directly south through Section 30, and it runs north and south through Section 30, does it not?

A. Yes, sir.

Q. Then down through Section 31, it curves a little to the west, and then passes out of that section?

A. Yes, that is the place I was talking about where it turns west of south.

Q. It is almost due west, is it not, as laid down on that map, and enters the lines of the Pueblo of San Marcos going nearly west

51 or a little south of west, and then takes to the southwest again as laid down on that map—is that correct?

Mr. CLANCY: The map shows for itself.

(No answer.)

Q. How long have you known the road from Pecos to Cerrillos?

A. I have known that road since 1866.

Q. What is the general direction of that road?

A. Well, when it comes out of Pino's ranch, it runs northeast for about three-quarters of a mile I think, and then it turns to the east until it gets to the Canada de los Alamos.

Q. What is the general direction of the road, east or west or north or south?

A. The general direction is east.

Q. Do you know what section Pino's ranch is in?

A. No, I do not. I know in which township it is in, but the section I do not know. It is in Township 15 north.

Q. Do you know the section—is it section No. 7?

A. I could not tell you.

Redirect examination by Mr. FRANK W. CLANCY:

Q. Do you know a spring called the Ojo del Coyote?

A. Yes, sir.

Q. Where is that situated with reference to the San Marcos grant?

A. I think it is north of the San Marcos grant.

Q. Examine this map and see whether that spring is correctly located on the map with reference to the San Marcos grant.

Objected to for same reasons interposed heretofore.

Overruled.

Exception reserved by defendant's counsel.

A. (Looking at map for some time.) Yes, I think it is correctly marked on this map.

Mr. CLANCY: I now offer in evidence the record of the marriage of Jose de Leyba, and a translation thereof, dated Aug. 1st, 1739, of which the copy and translation are presented as Plaintiff's Exhibit D, and reads as follows:

(Translation.)

On the 1st of Aug., seventeen thirty-nine, proceedings having been taken as the holy council of Joseph de Leyba Ma. Baca Trent requires and orders from which no impediments results, as
52 one resulted, I married and nuptially blessed in *facie ecclesie* Joseph de Leyba and Maria Francisca Rodriguez (or Baca), the witnesses to see them married being Juan Chrinos and Bartolome de la Cruz together with many others who were present, and this being the truth, I signed it said day, month and year.

FR. FRANCO. DE LA CONCEPON GONZALES.

Mr. F. W. CLANCY: At this time, I will file and read to the court and jury a stipulation.

In the District Court, San Miguel County.

MARIANO F. SENA, Plaintiff,

vs.

THE AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Stipulation.

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause that any record, document or instrument in writing, a copy of which is contained in the printed record of the case of Mariano F. Sena, Appellant, vs. the United States, lately pending as No. 40, October Term, 1902, in the Supreme Court of the United States, or any petition, answer, order or decree therein contained which may be a part of the proceedings of the court of private land claims, may be offered in evidence on the trial of said cause, subject to all legal objections that might be made to the original (of which it is a copy) were said original itself offered as evidence; and in case the copy of such document or instrument so contained in the said printed record does not have the certificate of the custodian attached thereto, the party offering said copy shall at the time state and make a part of the offer of record the name of the person or official in whose custody the said original is to be found. It being the intention and object of this stipulation to avoid the expense and delay in procuring the attendance as witnesses the custodian of such records, documents or instruments, or the delay and expense of procuring the custodian to certify to the correctness of the copy, the original of which is to be found in his office or possession, or to avoid inconvenience of procuring properly certified copies of the pleadings, orders, and decrees of the court of private land claims, or the Supreme Court of the United States.

It is further stipulated that copies of any other records, documents, or instruments, duly certified by their lawful custodian, and not included in the printed record above referred to, may be offered on the trial of this cause with the same effect as the original, subject to all legal objections thereto, except as to their not being original; and this is to include any documents or instruments in the record of Santa Fe county, and certificates of the officers of the United States land office and the certificates of the payment of taxes and entries in church records.

H. S. CLANCY,
F. W. CLANCY,

Attorneys for Plaintiff.

EDWARD L. BARTLETT,
MATT G. REYNOLDS,

Attorneys for Defendant.

May 20, 1904.

Mr. F. W. CLANCY: I next offer in evidence the Will of Simon de Leyba, of which we present a copy and translation marked plaintiff's Exhibit E.

This will came from the Spanish and American archives which were in the custody of the Librarian of the Territory of New Mexico.

The COURT: This was before the annexation.

Mr. CLANCY: Yes, sir.

Mr. DAVIS: We desire to object to the introduction of the will. The obvious purposes of the introduction of this document are two: First, to prove the man who made the will is or was the son of Jose de Leyba, (secondly) to prove that he was the father of Salvador Leyba; that is, it is an attempt to prove the pedigree and relationship of these two persons by the declaration of this man Simon de Leyba, which in this case happens to be a declaration in writing; it is apparent that the admission of this instrument would be a breach of the laws against hearsay testimony; that is to say, by this method they are making Simon de Leyba testify in this court who was his father and who was his son. It is a well recognized rule of law that declarations of deceased persons may be introduced in court for that purpose—namely—for the purpose of proving pedigree, but there is a qualification of that rule, namely—that before the declaration of any person may be introduced for that purpose it must be shown by intrinsic evidence—by evidence
54 apart from his own declaration, that he is related to the persons about whom he pretends to testify, that is, the mere declaration of Simon de Leyba—his own statement, * * * is not sufficient under the rules as laid down by the various decisions to prove that he was the son of Juan Leyba, or the father of Salvador Leyba.

The COURT: As I understand it, Mr. Sena bought this property only a few years ago. I do not see why this Leyba cannot be brought in.

Mr. CLANCY: Unfortunately the members of the family are dead. I can prove declarations of Salvador Leyba as to his family. The witnesses by whom I want ot prove that are not here now.

The COURT: I think you better do that. I will allow this will in evidence, subject to that proof.

Mr. DAVIS: I desire to make a further objection of the will. The rule is that an ancient document proves itself. I understand that rule to be dependent that the instrument must come from the proper custody. It is not possible to introduce in court an instrument which purports to be one hundred years old and have it prove itself. It must be proven that it comes from the proper custody. I understand this will was found in the Spanish archives.

Mr. REYNOLDS: The original was originally in the office of the territorial librarian, and was discovered by Mr. Clancy there, and the certificate to the instrument that was filed is the certificate of the territorial librarian, and therefore I assume it was a part of the archives in the possession of the librarian of the territory.

Mr. CLANCY: I did not suppose there would be any objection like

that. They were a part of the original archives turned over and assumed by the American government when we took charge of it.

Mr. REYNOLDS: The question is whether it is in proper custody so its authenticity and verity can be made. I have no doubt your copy is a true copy. I have no doubt the original was in his possession at the time he made the certificate. The question arises, is the officer who was the custodian of it, and certified to it, is and was he the lawful custodian at the time, so the verity proves itself on account of it being an ancient document.

Mr. CLANCY: I think there is a statute of the territory on that subject.

The COURT: You may look it up and submit it later.

55 The will was here read to the court and jury and marked Plaintiff's Exhibit E, and is as follows:

(Translation.)

In the name of Almighty God, the Father, Amen. All who may see this writing of my testament that I, Zimeon de Leiba, finding myself in my sound and entire judgment, memory, as testament and will, I have believed as I firmly believe in the Mystery of the Most Holy Trinity, God the Father, God the Son, God the Holy Ghost, and one single, true God, and in all the other things which Our most Holy Roman Apostolic Catholic Church believes and ordains, which faith and belief I have lived and declare that I will live and die, and finding myself at my ranch, far from my house, and having received a mortal blow from an unbroken mule and believing myself unable to live nor my body to be moved, I command and order, before dying, my last will of my testament be made that all may see it, in the following form, to-wit:

Firstly. I send my body to the earth of which it was formed, and my soul I commend to God, Our Father; that my body be buried at the Chapel of San Miguel in Santa Fe, near my residence, and being at a proper hour, let it be with a mass of bodily presence.

Item. I declare and direct that there be paid nine days' of masses for the repose of my soul in the parish church of Our Father, Saint Francis, by the Reverend Father Hozio.

Item. I declare firstly that I have been married and nuptially blessed according to the rules of our Holy Mother Church with Feliciano Gonzales, already deceased some years, in which marriage we procreated one son, Salvador Antonio, whom I recognize as my sole heir.

Item. I declare as my property, the house of my residence at Analco which is composed of six rooms, a corral and stable, an interior court (placita) and a garden.

Item. I declare that I owe nothing to any one.

Item. I declare that Francisco Anzuras owes me seventeen dollars of the country, which I direct shall be collected.

Item. I declare that Francisco Coriz, a native of the Pueblo of Santo Domingo, owes me fifteen she goats and ten breeding ewes, which I direct shall be collected.

Item. I declare for my country property, that I have twenty-seven breeding cows and four yoke of oxen, five range bulls, ten yearling heifers and five over a year old.

56 Item. I declare that I have thirty-two she goats without the little ones.

Item. I declare that I have a small herd of mares, two broken horses, one unbroken mule, five asses, two unbroken and three broken, which are in the possession of Antonio Riega at the Arroyo de Piedra.

Item. I declare that I have two sculptured saints and one Holy Christ of bronze, one large carpet of twenty-six Castilian varas, one canopy, two bedsteads, one large copper kettle, one small copper kettle, and one small kitchen tripod.

Item. I declare that I have here one complete corn-crib.

Item. I declare that I have one piece (suerte) of wheat-growing land adjoining the Tenorios.

Item. I declare that I have in my possession the sabre of my deceased father, which I direct shall be delivered to my son Salvador.

Item. I declare that I have an old trunk of raw-hide in the house of my residence at Santa Fe.

Item. I declare that I have a pistol, a cartridge-box, and a Spanish gun.

Item. I declare that I have a grant of lands given by the King of Spain to my deceased father Joseph de Leiba in 1728, nad their boundaries are as follows:

On the south the slope (cuesta) called the arroyo of the oregano, on the north, the road which goes towards Pecos from the Cerrillos, or lands of the Captain Sebastian de Vargas, on the east with the road which goes from Santa Fe to the spring of San Marcos, on the west with lands of the old Pueblo of the Cienega, as appears by the original papers which are to be found in the trunk of my residence at Santa Fe. In said grant there is constructed a ranch at the Coyote Spring, a small house, two rooms and a small kitchen, a little tower, a large corral of poles, two corrals for young animals, a corn-crib not very large with corn and beans, a hut (jacal) in the temporal lands. There is at my ranch my farming tools, six plows, two axes, two hoes, six yokes, three ox-goads, one loom, one spinning wheel, three skeins (of silk?) two wool-cards, one adze, four pairs of yoke straps, four plow-beam straps, one riding saddle complete. As. S.

And in order to complete this my testament and last will I order appoint for my executor my son Salvador Antonio, and for
57 its better validation and stability, I sent to supplicate and ask the Alferez Salvador Rivera that he should come here to my ranch, I not being able to move myself on account of my being accidentally wounded (or hurt), that he should interpose his authority, and said Alferez I said that *that* I was executing and executed it, and I interposed my judicial authority and decree. I, said Alferez Salvador Rivera, who am present at its execution, as far as I may be able and there is authority in law, and I certify and know that the testator is at the present moment in danger but in his sound

and entire judgment according to the concurrence of reasons, that thus he executed it at this place of the Coyote Springs on the fifteenth day of the month of October in this year 1783, and this took place before me the Alferez Rivera at request were called and asked, being witnesses to the making of this testament Francisco Antonio Zuaso, Antonio Riega and Jose Miguel Bachiha.

ZIMEON DE LEYBA. (Rubric)

SALBADOR RIVERA. (Rubric)

Witnesses:

FRANCO. ATO. ZUASO. (Rubric)

ANTO. RIEGA. (Rubric)

Witness:

JOSEPH MIGL BACHICHA. (Rubric)

Mr. CLANCY: I now offer in evidence the church record of the baptism of Salvador Antonio Leyba, which shows that he was baptized February 14th, 1770, as the legitimate son of Simon de Leyba and Feliciana Gonzales, of which we present a copy and translation.

The same was marked Plaintiff's Exhibit F, and read to the court and jury, and is as follows:

(Translation.)

On the fourteenth day of the month of February, one thousand seven hundred and seventy, I solemnly baptized and anointed with the sacred oils, Salvador Antonio, legitimate son of Simon de Leyba and Feliciana Gonzales, whose sponsors were Miguel Quintana and Juana Barbara Quintana, and that so it may appear, I sign it the said day, month and year.

FR. JOSEPH DE URQUIDO.

Mr. CLANCY: I now offer in evidence the deed of Salvador Antonio Leyba to Juan Angel Leyba, which recites the latter is a son of the first, conveying the grant in question, a copy and translation of which is presented and marked Plaintiff's Exhibit G.

Mr. DAVIS: We desire to make a formal objection to this deed, that there is no proof of the execution of it, and especially no proof of the official character of Juan Gallego, who is recited as being the constitutional alcade. My objection is there is no proof that Juan Gallego, who signed the deed, was what he purports to be, the constitutional alcade.

Objection overruled by the court.

Exception reserved by defendant's counsel.

Plaintiff's Exhibit G was here read to the court and jury as follows:

(Translation.)

[Seal Mexican Republic.]

Third seal, two reals, for the years of one thousand eight hundred and twenty-six and eight hundred and twenty-seven.

(Seals on the margin:)

(Seal, validated for the years 1828 and 1829.)

(Seal, validated for the years 1830 and 1831.)

(Seal, validated for the years 1832 and 1833.)

(Seal, validated for the years 1834 and 1835.)

In the city of Santa Fe and capital of New Mexico on the ninth day of the month of August, one thousand eight hundred and thirty-four, before me the citizen Juan Gallego, constitutional alcalde of first appointment in said city and its jurisdiction, appeared present in their own proper persons the citizens Salvador Antonio Leyva and his son Juan Angel Leyva, residents of the said city whom I certify that I know, and the first said that he was giving, aliening, selling and conveying and in effect did sell, give and alien and convey to his son Juan Angel Leyva, all my right which comes to me by inheritance and law in the rancho of the Coyote Spring with its houses and corral together with the grant in which the said ranch is situated which was given to my grandfather by the King of Spain the twenty-fifth day of May, one thousand seven hundred and twenty-eight.

And its boundaries are as follows to-wit on the north by lands of the Captain Sebastian de Vargas, on the east by the road which goes from the said city of Santa Fe to the spring of San Marcos, and on the west by lands of the old Pueblo of the Cienega, and on the south by the hill (cuesta) called the Arroyo of the Oregano.

59 Which I, the said Salvador Leyva, declared to have sold conveyed and given and aliened for the price and quantity of two hundred and twenty-four dollars of the country which he confesses to have received to his satisfaction and content and that if it be or may be worth more, he makes to him of the excess pure absolute perfect irrevocable gift and donation which the law calls *inter vivos*, and that he conveys aliens in favor of the said Juan Angel Leyba all the right and dominion which the said grant has and in order that he may enjoy it as he may wish, selling it, aliening it without any impediment interposed by him his heirs and executors successors and if by chance they should interpose it they shall not be heard neither in court nor out of it binding himself in that case to come to the defense until he be left in quiet and peaceful possession for whose indemnification and fulfilment of this deed he binds his person and property present and future all subject to the laws of the matter.

All of which he executed before me the constitutional alcalde afore-said and before those of my attendance with whom I act and certify as delegate judge asking me I should interpose my judicial authority and power and I said alcalde declared that I was interposing and did interpose it as far as by law is conferred upon me in testimony of

which he signed with me and those of my attendance to which I certify.

SALVADOR ANTONIO LEYVA. X

Witness:

PEDRO LOVATO.

JUAN GALLEGO.

Witness:

MGL. ANTO. RUBIO.

Attending:

TSQUIPULA PAHECO.

Attending:

JUAN GARCIA.

Mr. F. W. CLANCY: I now offer in evidence the will of Salvador Antonio Leyba, as it appears of record in the records of the probate court of Santa Fe county, and present a copy and translation which will be marked Plaintiff's Exhibit H.

Mr. DAVIS: We make the same objection to this document that was made to the introduction of the other will, namely, that the declaration of Salvador Leyba to the effect that he was the father of Juan Angel Leyba is not admissible, without other proof of his relationship to the family.

The COURT: I will admit it subject to further proof on that point.

Mr. DAVIS: We object further on the ground that the will has never been probated.

Objection overruled.

Exception reserved by defendant's counsel.

The translation of the will was here read to the court and jury and marked Plaintiff's Exhibit H.

[This exhibit appears later, when the original of the will is offered.]

THOMAS GWYN sworn.

Direct examination by Mr. FRANK CLANCY:

Q. What is your name?

A. Thomas Gwyn.

Q. Where do you reside?

A. In Santa Fe.

Q. What is your occupation?

A. Surveyor.

Q. How long have you lived in Santa Fe?

A. For the last twenty years or more.

Q. Are you familiar with the country west and southwest and south of Santa Fe, for a distance of 12 or 20 miles?

A. Yes, sir.

Q. Have you seen this map before?

A. Yes, sir.

Q. From your examination of the map and your knowledge of

the country can you state whether or not that map shows with substantial accuracy the location of natural objects and roads that are named thereon, and also the house of Nasario Gonzales?

A. Yes, sir.

Q. Does it show those things with accuracy or not?

A. Why to the best of my belief it does.

Q. Have you such knowledge of the country that you can express a positive opinion about it?

A. Well, I have passed over those roads a great deal in the last 20 years, and been all over that country.

Q. Well, from your knowledge, can you say whether or not that map as to those matters is substantially correct?

A. I believe to be so.

61 Q. Can you say positively whether it is or not?

A. Well, sir, approximately, it is.

Cross-examination by Mr. REYNOLDS:

Q. Do you know the location of the Cerrillos tract?

A. Yes, sir.

Q. What is its location?

A. It runs across there from Bonanza from the northwest to the southeast.

Q. Do you know anything about the section lines down there?

A. I have been on them. I know something about them.

Q. When was the first time you were down there?

A. I was down there in 1879.

Q. The first time you were there in 1879?

A. 1879 or 1880, during the mining excitement.

Q. Do you know where Pino's ranch is?

A. Yes, I have been there, but I don't remember the section.

Q. How is it situated with reference to the Cerrillos tract?

A. Pino's ranch is right below the Delgado ranch in a westerly direction.

Q. How about the Sitio de Juana Lopez?

A. That is west of the Cerrillos tract.

Q. Does it adjoin the Cerrillos tract?

A. I believe it does.

Q. What about the Sitio de los Cerrillos?

A. That is on the east.

Q. East of what?

A. I am more familiar with the Cerrillos tract than I am with the others. I know the other two are west of that.

Q. What direction is Nasario Gonzales' house from Pinos' ranch?

A. It seems to me that Gonzales' ranch is northeast from it.

Q. Northeasterly from Pinos' ranch * * * Do you know where the road from Pecos to Cerrillos is located?

A. Yes, sir.

Q. What is its direction?

A. From Pino's ranch it runs in a northeasterly direction.

Q. How close to Gonzales' house does it run?

A. I cannot say very well without looking at the map.

(Here follows maps marked pp. 62 & 63.)

64 Redirect examination by Mr. F. W. CLANCY:

Q. I understood you to say that the road from Pecos to Cerrillos went in northeasterly direction from Pino's ranch?

A. Yes, sir; for a little distance, and then it runs easterly—that is what I meant to say.

Mr. CLANCY: I now offer this map in evidence.

Mr. REYNOLDS: We object to the map on the ground of its not having been sufficiently proven to identify the boundaries of the various locations and particularly with reference to the land sued for, and as not having been sufficiently identified so as to locate with reasonable accuracy the land grant upon which the suit is predicated nor the property sued for or the boundaries of the grant itself.

Objection overruled by the court.

Exception reserved by defendant's counsel.

The map was here marked Plaintiff's Exhibit I.

Mr. CLANCY: The line draw- across from east to west along the line marked "Creek" or just above that, is the south boundary of the pueblo Viejo de la Cienega grant.

Mr. REYNOLDS: We make the further objection that the south line of the alleged grant is an arbitrary line drawn by counsel and not by the witness or any surveyor.

Objection overruled.

Exception reserved by defendant's counsel.

FELIPE PINO SWORN.

Direct examination by Mr. F. W. CLANCY:

Q. What is your name?

A. Felipe Pino.

Q. Where do you reside?

A. I live in Santa Fe.

Q. How long have you lived in Santa Fe?

A. I was born here. I have lived here since I was born.

Q. When were you born?

A. I was born in 1839.

Q. Have you ever been acquainted with a man named Salvador Leyba?

A. Yes, I knew him.

Q. When did you first know him?

A. I knew him when we were about 8 or 9 years of age.

Q. Was he older or younger than you?

65 A. I don't know whether he was older. We looked about the same age.

Q. Where did Salvador Leyba live when you first knew him?

A. He lived on the other side of the river at a place called Analco, in San Miguel.

Q. With whom was he living when you first knew him?

A. He lived with an aunt of his named Josefa Leyba.

Mr. DAVIS: I object to that part of the answer in which he says that Josefa Leyba was the aunt of Salvador Leyba.

Mr. CLANCY: I expect to show that he knew the family for many years, and in that way he has knowledge.

The COURT: Proceed.

Q. Do you know, or did you ever hear who was the father of this Salvador Leyba?

Objected to by defendant's counsel.

The COURT: Answer yes or no.

A. I heard say who his father was.

Mr. CLANCY:

Q. From whom did you ever hear who his father was?

A. I heard him say so; and I heard it from the mother—the woman who raised him.

Q. Who raised Salvador Leyba?

A. Josefa Leyba.

Q. Who was the mother of Salvador Leyba?

A. Inez Apodaca.

Mr. DAVIS: We object to this testimony. The witness means of knowledge is not shown, and we move to strike it out.

The COURT: How do you know that Inez Apodaca was the mother of Salvador Leyba?

A. Because she went to my house herself to ask for a girl, Juanita Alarid, who was a sister-in-law of mine, she came to ask for this girl to be married to Salvador Leyba.

Mr. CLANCY:

Q. Did you ever hear Josefa Leyba say who was the father and mother of Salvador Leyba?

A. Yes, sir.

Q. Who did she say were his parents?

A. Juan Angel Leyba was his father, and Inez (Ynez) Apodaca was his mother.

Q. Did you ever hear Salvador Leyba say who his parents were?

66 A. Yes, sir.

Q. What did he say on that subject.

A. That Juan Angel Leyba was his father and Inez Apodaca was his mother.

Q. Did you ever personally know Juan Angel Leyba?

A. I did not.

Q. Did you ever hear from any one in the family how he died?

A. I heard Salvador Leyba say and also his mother.

Q. What did they say about how he died?

A. They said that the Indians killed him.

Q. Did you ever hear them say where he was killed by the Indians?

A. They told me that it was at Ojo -el Coyote where he was killed—at his own ranch—the ranch of Juan Angel Leyba.

Q. Did you ever hear from Josefa Leyba or Salvador Leyba tell to you who their ancestors were and their family?

A. Yes, sir.

Q. If you heard from them, or either of them, state what they told you as to who was the father of Josefa Leyba?

A. The father of Josefa Leyba was Jose de Leyba.

Q. Did you ever hear from Josefa if she had any brothers or sisters?

A. I heard Josefa say that she had one brother and one sister. The sister I knew myself, Manuela Leyba, and Juan Angel Leyba, the brother, I did not know.

Q. Did you ever hear when he was killed?

A. I did hear.

Q. About when was he killed from what you heard?

A. I don't know the date of the year, but I heard it said he was killed by the Indians.

Q. Did you hear whether it was before or after Salvador was born?

A. Salvador was already born when his father was killed.

Q. Did you ever hear from Salvador or Josefa Leyba how it happened Josefa Leyba raised Salvador Leyba?

A. Yes, sir.

Q. How did it happen?

A. Josefa Leyba used to talk to me frequently. She visited the house of my parents frequently, and she used to say: "Now I have another son, although I have no children, the son of my brother

67 Juan Angel Leyba has been given to me so I might raise him as my own son." That is what I heard her say.

Q. Did you ever hear from Salvador Leyba or Josefa Leyba about the grant called the Leyba Grant?

A. I heard Josefa Leyba say, and also Salvador, when he became my wife's brother-in-law.

Q. What did Josefa Leyba tell you about the Leyba grant?

A. That her son, Salvador Leyba, had a grant, and had several other interests within the grant through inheritance of his deceased father. That is what she told me.

Mr. DAVIS: I move to strike out that answer on the ground you cannot shown ownership of real property upon the statements of individuals as to whether they owned it themselves, or whether their ancestors owned it.

Mr. CLANCY: This is to identify Salvador with this property.

Objection sustained by the court.

Exception reserved by plaintiff.

Q. Do you know who was the grandfather of Salvador Leyba?

A. Salvador Antonio Leyba.

Q. Did you ever hear from Josefa Leyba anything about the family of Leybas who owned this grant from the grantee down?

A. Yes, sir.

Q. From what she told you, who was the grantee?

Mr. DAVIS: We object to this on the same ground.

Mr. CLANCY: This is hearsay evidence as to pedigree by a person long since deceased.

Mr. DAVIS: I have not been objecting to these questions because I expect to move to strike out at the end of the examination.

Mr. CLANCY: I am only trying to prove the family and identify this man as one of the family, and this is directly in line of meeting the objection to the will of Simon Leyba of 1783.

The COURT: I think if this man can prove that Simon had a son Salvador, I will admit that.

Mr. CLANCY:

Q. From what Josefa Leyba told you who was the original grantee?

A. Jose de Leyba.

Q. Now did you hear from her whether Jose de Leyba had any children or not?

A. I do not know.

Q. You have said that Salvador Antonio Leyba was the grandfather of Salvador Leyba—did you ever hear who was the father of Salvador Antonio Leyba?

A. Yes, sir. It must be Jose de Leyba.

Q. Did you ever hear from either of those Leyba's anything about a Leyba called Simon?

A. I did hear of such.

Q. Now, who was Simon Leyba?

A. Simon Leyba was the father of Salvador Antonio Leyba.

Q. Did you ever hear from them who was the father of Simon de Leyba?

A. Yes, sir.

Q. What did they say about that?

A. That Jose de Leyba was his father.

Q. Do you remember when you first heard that Juan Angel Leyba had been killed by the Indians?

A. I remember that I heard this said at one time when I was at the Ojo del Coyote. I don't remember the date. I had to come there for some oxen. My father sent me for that purpose, and those who were there—I don't remember their names—said that he had been killed before by the Indians.

Mr. DAVIS: I move to strike out the last part of the answer of this witness to the effect that he went to Coyote Springs and there some people whom he did not know told him that Juan Angel Leyba had been killed by the Indians. That is certainly as absolute a piece of hearsay evidence as could be offered in any court.

The COURT: I will strike out the latter part of the answer of the witness as to what the people told him.

Q. About how old were you when you first heard that Juan Angel Leyba had been killed by the Indians?

A. I was fifteen or sixteen years of age.

Q. What was the name of your first wife?

A. Josefa Alarid.

Q. What was the name of her sister who was asked in marriage for Salvador Leyba?

A. Juanita Alarid.

Q. At the time she was asked for marriage, where was she living?

A. She lived with me at my house, in my home. She was a sister of my wife.

Q. Were her parents living at that time?

69 A. No, sir.

Q. Where was Salvador Lebya living at that time?

A. He lived at the house of his aunt, Josefa, at San Miguel.

Q. Who came to ask for Juanita?

A. Many people went there.

Q. Who were they?

A. Many of them went, his aunt Josefa, and two daughters of Josefa and the mother of Salvador, Ynez Apodaco. I remember this. They came to ask for her.

Q. Do you know where the old road is from Cerrillos to Pecos?

A. Yes, sir.

Q. About how far is that from Santa Fe?

A. Where the road is?

Q. Yes, sir.

A. Less than 12 or 13 miles.

Q. What is the general direction of that road?

A. The road from Cerrillos to Pecos?

Q. Yes, sir.

A. It runs from Cerrillos to the east.

Q. Do you know where the road to San Marcos is?

A. Yes, sir.

Q. Does the old road from Cerrillos to Pecos, does that cross the San Marcos road or not?

A. Yes, sir; it crosses it.

Q. Do you know where the Coyote Spring is?

A. I knew the Ojo del Coyote many years ago.

Q. In what direction is the Ojo del Coyote from the old road which runs from Cerrillos to Pecos?

A. To the south of the road.

Q. And in what direction is that spring from the San Marcos road?

A. To the north of the road and northwest.

Q. Do you know where the San Marcos Spring is?

A. Yes, sir.

Q. In which direction from that spring is the Ojo del Coyote?

A. To the north of the San Marcos.

Q. Now describe that Ojo del Coyote—how is it situated in the grant?

70 A. The Ojo del Coyote is situated in an arroyo which has been called the Arroyo del Oregano.

Q. When you were at the Ojo del Oregano as a boy did you see there any signs of habitation at the Ojo del Coyote Spring?

A. I saw ruins of houses.

Q. Describe those ruins as well as you can?

A. The ruins I saw contained walls, something like a *torreon* or tower.

Q. How large a house did that appear to be there?

A. It was a small house. I was there many years ago. It had the appearance of being a small house, but I also saw the ruins of corrals.

Q. Where were those ruins relative to the position of the springs, in which direction from the springs?

A. They were north of the springs about 50 or 60 feet distant—that is my recollection now.

Q. Do you know the Penasco Blanco de los Golondrinas?

A. Yes, I know it.

Q. Do you know the house where Don Nasario Gonzales lived at La Cienega?

A. Yes, sir.

Q. In what direction is the Penasco Blanco from the house of Nasario Gonzales?

A. It is north of the house.

Q. And how far away?

A. About a mile and a quarter, may be a little more.

Q. Do you know the hill where the Turquoise mines are?

A. I know it.

Q. In which direction is that hill from the Ojo del Coyote?

A. It is to the west.

Q. And does that hill lie to the east or west of the Penasco Blanco?

A. It is to the south of the Penasco Blanco—the mine.

Q. Can you tell whether it would be east or west of a north and south line drawn through the Penasco Blanco?

A. Yes, sir.

Q. If a line — drawn north and south through the Penasco Blanco, and extended to the south, would that hill where the mine is be to the east or west of that line?

A. It would lie to the west the Penasco Blanco.

Q. Well, that is answering it the other way. Now, is Salvador Lebya alive or dead?

71 A. He is dead.

Q. How long has he been dead?

A. I believe he died in the year 1896 or 1897.

Q. A few years ago then?

A. Yes, a few years ago.

Q. Is Josefa Leyba alive or dead?

A. She is dead.

Q. Do you know how long she has been dead?

A. No, sir, I do not know. I was not in Santa Fe when she died.

Q. Where were you at the time she died?

A. I was then a soldier.

Q. In what war?

A. In the War of the Rebellion between the North and South.

Mr. DAVIS: I move the court to strike from the record, and take from the consideration of the jury all statements to which this witness has testified, made by Salvador Leyba and Josefa Leyba as to the fact of Juan Angel Leyba being killed by the Indians, and as to the place and time when he was killed. Whether or not hearsay testimony may be admissible for the purpose of showing pedigree, it certainly is not admissible for the purpose of showing a definite fact which in no way comes under the head of pedigree. It makes no difference to the pedigree in this case where Juan Angel Leyba was killed, or whether he was killed or not, and it comes within none of the recognized exceptions to the rules admitting or excluding hearsay. On these grounds I move to strike out and take from the jury all of that testimony.

Mr. F. W. CLANCY: I never heard just that sort of an objection, but it occurs to me that any evidence as to pedigree, statements as to the death, manner of death and time of death, must be necessarily admissible, tending to throw light on the whole question—statements made by members of the family.

Mr. DAVIS: I desire further to move to strike out all the testimony of this witness as to statements made to him by Salvador Leyba or Josefa Leyba—their statements as to who was the father of Salvador Leyba on the same ground on which we objected to the admission of the will, that is to say, on the ground that there is absolutely no testimony to show that Josefa Leyba or Salvador Leyba were related to the members of the Leyba family in this suit, 72 excepting their own statements made to this witness, and under the rules as laid down in the few authorities I showed to the court there must be some extrinsic evidence of their relation to the family aside from their own evidence.

I further move to strike out and take from the jury all the testimony of this witness as to statements of Salvador and Josefa made to him concerning the other ancestors of Salvador and Josefa, running the genealogy back to Jose de Leyba on the same ground, and on the further ground that their testimony as to — Jose de Leyba was, and who his son in turn was, was necessarily hearsay in the person from whom this person heard it. The witness has testified he was born in 1839. It is safe to say he could not have heard of these things to recollect them before 1850. The grant in this case was made in 1728. Some of the other instruments in 1783. From 75 to 100 years prior to the time when the witness heard these statements made; consequently the persons who made the statements to him must have necessarily stated to him things told by others; they could not necessarily lie in their own personal knowledge. On that ground that they were necessarily testifying to hearsay, and on the further ground that they still have not been connected to the Leyba family excepting by their own statements, we ask that that testimony be taken from the jury and stricken out.

Objection and motion overruled by the court.

Exception reserved by defendant's counsel.

The COURT to witness:

Q. Do you know when Salvador Antonio Leyba died?

A. No, sir; I do not know.

Mr. CLANCY:

Q. At this point I will now offer in evidence the record in the county records of a deed bearing date March 24th, 1836, made before an alcalde of Santa Fe, by Juan Angel Leyba to Jose Antonio Romero, of which we will have a copy and translation made and present it with the other papers to be marked Plaintiff's Exhibit J.

The COURT:

Q. Who was Ynez Apodaca the mother of?

A. Salvador Leyba.

Mr. CLANCY:

Q. Do you mean the Salvador who died a few years ago?

73 A. Yes, sir.

Q. Have you any knowledge or did you ever hear the members of the family say as to whether the father and mother of Salvador Leyba had been married?

A. Yes, sir.

Q. Who told you that they had been married?

A. Ynez Apodaca told me so herself, and Josefa Leyba who was her sister-in-law, they told me that when they became a part of my family.

Mr. DAVIS: I desire to object to this last deed Exhibit J. I desire to object to it because it is not signed by Juan Angel Leyba, but by Augustin Duran who is cited as being second constitutional alcalde, and by five other persons as attending witnesses, etc., and it is not signed by the grantor.

The COURT: It is only notice—not to show the transfer of property, but to show about the time of the death of Salvador.

Mr. DAVIS: I further object on the ground that the official character of Augustin Duran, by whom the instrument is signed, is not proven.

Mr. CLANCY: I would not undertake to prove that 70 years afterwards. I don't think it is necessary.

Objection overruled by the court.

Exception reserved by defendant's counsel.

Mr. DAVIS: I would like to have my motion made broad enough to include the few sentences of testimony he gave after I made the motion.

Mr. CLANCY: It may be understood to go as to all his testimony.

(EXHIBIT J.)

Deed from Juan A. Leyba to Jose A. Romero.

Fourth Seal.

[SEAL.]

One Quartilla.

For the years one thousand eight hundred and thirty-six and eight hundred and thirty-seven.

In the city of Santa Fe, capital of the Territory of New Mexico, on the 24th day of the month of March, one thousand eight hundred and thirty-six, before me Don Agustin Duran, second constitutional alcalde of this city, personally appeared Juan Angel Leyba and Jose Antonio Romero, both residents of this jurisdiction, and the first said that, representing the persons of his sisters, Juana and

74 Josefa Leyba, and Rafael Gutierrez, both heirs of Salvador Leyba, deceased, he would and in fact did sell, of his own free will, to the said Romero, a piece of agricultural land measuring eighty-six varas in width and two hundred and fifty-four varas in length, which he sold for the price of forty-three dollars, which sum the grantor states to have received in goats and cash to his entire satisfaction, and that he does this with the just end of paying the funeral and burial expenses of his deceased father as his sole heirs, and that if said land is or should be worth more, of the excess he makes to the purchaser gift and donation, pure, simple, perfect, and irrevocable, which the law terms *inter vivos*, and that he gives and transfers in favor of the aforesaid purchaser all the right and seignory that he had in said land, in order that he may use it in the manner that he may choose, selling or alienating it as he may deem proper, in regard to which neither the grantors, their children, and heirs, nor the other successors, will institute any suit or claim whatsoever at any time, and in case they should bring it that they be not heard either in or out of court, and that in such a case the grantor binds himself and for the parties he represents to appear in defense until he leaves him in the quiet and peaceable possession thereof. For the execution and compliance of this deed he binds his person and present and future property, all subject to the laws in the matter. The boundaries of the land sold being on the east by lands of Pablo Aliri, on the west by the grantor, on the north by the aforesaid Aliri, and on the south by Juan Jose Lujan; all which he executed before me, the said constitutional alcalde, asking me to interpose my authority and judicial decree, and I, the said alcalde, stated that I would and did interpose it insofar as is required by law and is authorized. In witness whereof he thus executed and signed it with me, and the instrumental witnesses, who were the citizens Domingo Fernandez, Santiago Armijo, and Gaspar Ortiz, being present and residents of this city, with those of my attendance, to which I certify.

AGUSTIN DURAN.

Instrumental: Santiago Armijo. Instrumental: Gaspar Ortiz.
Instrumental: Domingo Fernandez. Attending: Jorge Ramirez.
Attending: Nicolas Pino.

Cross-examination by Mr. M. G. REYNOLDS:

Q. Where did you reside in 1836?

A. I have always lived in Santa Fe.

Q. Where did you live in 1839. In Santa Fe?

75 A. I was born in that year.

Q. Born in 1839?

A. Yes, sir.

Q. What year did you have this conversation with Josefa Leyba, which you have testified to?

A. It must have been about the year 1860, and part of 1861.

Q. What was the occasion for the conversation. How did you happen to talk to her in 1860 and 1861 about it?

A. I remember they were talking about Salvador, their nephew, having interests in the grant.

Q. And that was in 1860?

A. Yes, sir.

Q. How did you happen to be talking with them in 1860 about it?

A. I was present when Salvador married my sister-in-law, Juana Alarid.

Q. When did that marriage take place?

A. It took place in February of 1860.

Q. When did Salvador die?

A. I am not quite sure, but he died in 1896 or 1897.

Q. How old was Salvador Leyba when he was married?

A. I don't know what age he had.

Q. Did you know his mother?

A. I knew her.

Q. What was her name?

A. Ynez (Inez) Apodaca.

Q. Who was his grandfather?

A. Salvador Antonio Leyba.

Q. Who was his great-grandfather?

A. I don't know.

Q. Who was his father?

A. Juan Angel Leyba.

Q. When was the last time you were down on this grant?

A. I was there in the years 1865 and 1866.

Q. And you haven't been down there since?

A. I have not been there since.

Q. Do you know where the road leading to Galisteo is located?

A. Yes, sir.

Q. What is the general direction going from Santa Fe?

A. The general direction is south of Santa Fe.

76 Q. What is the direction of the Penasco Blanco from the house of Nasario Gonzales.

A. To the north.

Q. How far?

A. About a mile and a quarter or a little more.

Q. Do you know where the Cerrillos grant is located?

A. The grant of Cerrillos?

Q. I am talking about the Old grant, if you know anything about it.

A. I know it is where the house of the deceased Don Manuel Delgado was. I knew that place as the old Cerrillos.

Q. How close to that tract does the Galisteo road run?

A. About 10 or 15 miles.

Q. Was there a road leading from Cienega, the pueblo, down to the Galisteo?

A. I know that there is a road there.

Q. Going down towards Galisteo?

A. Yes, sir.

Q. Does that run on the east side or west side of the Cerrillos Grant, the Old Grant?

A. Between south and east.

Q. Well, is it to the east of the Cerrillos Grant, on the east side of it?

A. To the east of the grant of Cerrillos.

Q. Was that road an old road when you first knew it?

A. It was an old road. I do not know how old it is.

Q. You say you know where the turquoise mines are located?

A. Yes, I have been told where they are—I have not been right at the place myself. I have seen them from the road.

Q. What road?

A. That road that goes to Cerrillos.

Q. When did you see them—what year?

A. I saw them about three years ago when I was going to Cerrillos. I was going to see Doctor Palmer.

Q. What road to Cerrillos, the road from Pecos to Cerrillos, you are talking about?

A. No, I do not mean that road.

Q. Well, what road to Cerrillos, from where?

A. It comes from Cerrillos and goes through a place called Carbonateville.

77 Q. Which side of the mines does that road run? East or west of them?

A. It is on the west from the mines.

Q. When was the last time you were at Coyote Spring?

A. At that same time.

Q. When was the last time that you was at Coyote Spring?

A. As I said before, my testimony must be down there. I don't remember exactly, but it was in the year 1860 or 1861. I am not very certain about that.

Q. Do you know the location of the road from Sante Fe to San Marcos?

A. Yes, sir.

Q. How long have you know- that?

A. I knew that road since I was very young. I don't know exactly how old I was.

Q. What arroyo do you say the Coyote Spring is situated in?

A. In the Arroyo known as the "Arroyo del Oregano."

Q. Is there an arroyo down there known as the Arroyo de la Piedra?

A. There is an arroyo there by that name.

Q. Is it the same?

A. It connects with the arroyo de la Piedra. About the distance of 200 yards more or less.

Q. It is one and the same arroyo is it not?

A. It becomes the same arroyo.

Q. What other arroyo down there do you know?

A. I know the arroyo of San Marcos.

Q. Where is that located with reference to Coyote Spring.

A. It lies to the south of the Ojo de Coyote.

Q. What other arroyo is located near to the Coyote Spring—close to it?

A. I only remember the one that comes from the Canada de las Gallinas and connects with the arroyo del Oregano.

Q. What direction does that come from?

A. It comes from the east or northeast.

Q. How far is the San Marcos Spring from the Coyote Spring?

A. About 150 yards, maybe more.

Q. From the Coyote Spring to the San Marcos Spring?

A. Yes, sir; maybe more.

Q. Maybe how much more?

78 A. I don't know. It maybe more than 150 yards.

Q. Do you know where the "Pino's Ranch" is located?

A. Yes, sir.

Q. When were you there last?

A. I was there three years ago when I passed going to Cerrillos.

Q. Is Pino's Ranch situated in the Sitio de Juana Lopez Grant?

A. I don't know. I was not right at the ranch. I stopped there at the "Vega" right on the road that goes to Cerrillos by Bonanza.

Re-direct examination by Mr. F. W. CLANCY.

Q. Where did the Doctor Palmer live you spoke of?

A. He lives at Cerrillos, right on the railroad.

Q. And that is the place to which you were going three years ago then?

A. Yes, sir.

BRIGIDO GABALDON SWORN.

Direct-examination by F. W. CLANCY:

Q. State your name?

A. Brigido Gabaldon.

Q. Where do you reside?

A. I live in Santa Fe.

Q. How old are you?

A. I am about 69 years of age.

Q. Do you know a spring called the Ojo del Coyote?

A. I knew it.

Q. About when did you first know that place or first see it?

- A. I am not quite sure, but it is about fifty-three years ago.
 Q. How often have you seen that spring? Have you seen it often or only once?
 A. Not since that time.
 Q. How is that spring situated on the ground?
 A. I did not take very particular notice of it.
 Q. Is it on top of a hill or in a valley?
 A. It is in the edge of an arroyo.
 Q. When you saw that spring, did you hear what the name of the arroyo was?
 A. Yes, sir; the Arroyo de-Oregano.
 Q. Did you see at or near the spring any signs of habitations or houses?
 79 A. Yes, I saw ruins there.
 Q. What sort of ruins?
 A. I saw some adobe walls.
 Q. About how high were they?
 A. I could not swear well how high they were.
 Q. Did you see anything else in the way of ruins or is that all?
 A. No, sir.
 Q. Now was this arroyo a deep arroyo, with a hill on each side?
 A. Yes, sir; there were hills on two sides.
 Q. Have you ever lived out there anywhere in that country, southwest of Santa Fe?
 A. I worked some at Juana Lopez.
 Q. For whom did you work there?
 A. For Don Nicolas Pino.
 Q. How far is that from Coyote Spring?
 A. What?
 Q. Juana Lopez?
 A. I don't know; it is not far.
 Q. In which direction is Juana Lopez from the Coyote Spring?
 A. Juana Lopez is on the side the sun sets and Ojo Coyote is on the side the sun rises

Cross-examination by M. G. REYNOLDS.

- Q. You say there were some ruins near the spring?
 A. Yes, sir.
 Q. Do you know who originally put that house there?
 A. No sir; I do not.
 Q. Did you ever know a man named Jesus Narvais?
 A. I don't remember.
 Q. Did you know Nasario Gonzales in his life time?
 A. Yes, sir.
 Q. Where did he live during his life time?
 A. He lived at the place calle-1 "Guicu."
 Q. How long since were you down in that country?
 A. Where, do you mean?
 Q. Around the Coyote Spring, you have been testifying about?
 A. I was not a very much time at the place, but I was at Juana Lopez working for Pino for sometime.

Q. When?

80 A. At the time he was building a house there.

Q. How old are you?

A. Sixty-nine years old.

Q. How old were you when you were working down there for Pino?

A. I must have been about 10 or 12 years of age.

Q. That is about 59 years ago then, or 57 years ago?

No answer.

Q. When you were down there was there any timber on woods down there around the Coyote Springs?

A. Not at the house, but a little distance from the house there was some.

Q. What kind?

A. There was cedar and piñon timber.

Q. Was there much down in that country?

A. I don't know how much there is now.

Q. Was there then?

A. There was a great deal of it at that time.

Q. What direction is Juana Lopez from the Coyote Spring?

A. I have already said that Juana Lopez is to the west and Ojo Coyote is to the east.

Q. Is the Juana Lopez directly west from the Coyote Spring?

A. I don't know whether it is on a direct line, but it is in that direction. On that side.

Redirect examination by Mr. F. W. CLANCY:

Q. When you went to the Coyote Spring what were you doing there?

A. I was working for Nicolas Pino, and he used to send me there to fetch wood.

Q. What directions or orders did he give you on that subject?

A. He did not give me any orders, he just told me to go after wood.

Q. Did he tell you where to get it?

A. No, sir.

Q. Did he tell you where not to get it?

A. He did not tell me that either.

Q. Did you go after wood alone?

A. I went with others.

Q. Did you hear him give any orders to the others then?

81 A. No, sir; I did not.

Adjourned to Tuesday, August 29th, 1905, at 9:30 a. m.

TUESDAY, Aug. 29, 1905.

Morning Session.

Father ANTONIO FORCHEGU, (Priest) sworn.

Direct examination by Mr. F. W. CLANCY:

Q. What is your name?

A. Antonio Forchegu.

Q. What is your occupation?

A. I am Vicar of the Catholic Church in Santa Fe.

Q. As such, have you in your charge the records of marriages, and baptisms, etc.?

A. I have.

Q. Have you brought here the record of marriages in the years 1859-60?

A. I have.

Q. Will you produce the record?

A. This is the book—(handing book to counsel).

Q. Father Antonio, I want you to point out the record of the marriage of Salvador Leyba, in that book?

A. Here it is (pointing out record of same to counsel and court and jury).

Mr. CLANCY: I offer that entry in evidence, of which we have a copy here marked Plaintiff's Exhibit K, and is as follows:

(Translation.)

Year 1860.

This third day of February, after the performance of the Christian duties, I joined in matrimony acting according to the orders of our Holy Church, Salvador Leyva of the real de Dolores, unmarried, legitimate son of Juan Angel Leyva deceased, and Maria Ines Apodaca, with Maria Juanna Alari of Santa Fe, unmarried legitimate daughter of Jose Alari, deceased, and Margarito Lopez, deceased.

Witnesses: Maximiano Ribera and Marcelino Lopez.

P. EGUILLON, *Cure*.

(WITNESS:) In the book, the name is written "Joanna," the way that name is written in Spanish is "Juana."

Cross-examination by M. G. REYNOLDS:

Q. Did you notice the spelling of the name "Leyba" in the record of the marriage? How is that name spelled?

A. In the book here?

Q. Yes, the word "Leyba"—how is it spelled in the book?

A. L-e-y-v-a. They write it either way, with a "b" or a "v." We have it in the books with a "b" and with a "v." It does not make any difference with us.

Mr. REYNOLDS: We will admit this Exhibit K is a correct copy of the record in the book, and substantially a correct translation, so you can take the book with you.

LUIS CONSTANTE, sworn.

Direct examination by F. W. CLANCY:

Q. What is your name

A. Luis Constante.

Q. Where do you live?

A. Here in Santa Fe.

Q. How long have you lived in Santa Fe?

A. Since I was born, fifty-three years.

Q. Were you ever acquainted with a woman named Apolonia Leyba?

A. Yes, sir.

Q. Is she living or dead?

A. She is dead?

Q. How long ago did she die?

A. I think she died in 1887.

Q. Was there any administration upon her estate?

A. Yes, sir.

Q. Do you know who the administrators were?

A. My father and myself.

Q. Will you examine this paper and state whether you have ever seen it before?

A. Yes, I believe I know that paper.

Q. Have you ever had it in your possession at any time?

A. Yes, sir.

Q. How did it come into your possession?

A. As administrator of the estate.

Q. That is of the estate we were just speaking of?

A. Yes, sir.

Q. Do you know who the mother of Apolonia Leyba was?

A. I heard her name as Josefa Leyba.

Q. From whom did you hear her name was Josefa Leyba?

83 A. I heard it from her own daughter.

Q. You mean Apolonia, for whom you were administrator?

A. Yes, sir.

Q. Where did you find this paper?

A. It was in one of the trunks of Dona Apolonia Leyba.

Mr. CLANCY: I will offer this paper in evidence, and I will say that this is the original of the Will the record of which was offered in evidence yesterday as plaintiff's Exhibit H, to which reference is now made as being a copy and translation of this original will. It is the Will of 1836. It is the Will of Salvador Antonio Leyba.

(Translation.)

Seal fourth.

(Seal.)

One cuartilla.

For the Years One Thousand Eight Hundred and Thirty-six and Eight Hundred and Thirty-seven.

In the name of Almighty God, and of the Ever Virgin Mary, Our Lady, conceived without original sin. Amen.

Be it known by all who may see this my testament that I, Salvador Leyba, being sick by the will of Almighty God, but in my complete and sound understanding, make and order this my testament which is my will, in the following manner: First, I state that I believe in and confess the mystery of the Most Holy Trinity, Father, Son, and Holy Ghost, three distinct persons and only one true God. I believe in all that Our Holy Mother, the Church, believes and confesses, and in this faith and belief I desire to live and die whenever it shall please God, in expectation of which I order this my testament in the following form:

First. I commend my soul to the Lord, who created and redeemed it with the price of His Most Holy Blood, and my body to the earth from which it was made, which it is my will shall be shrouded as my children may determine, and that it be buried in the cemetery of this city, and that my burial be a humble one.

Item. I order that there be given to obligatory bequests two dollars.

Item. I declare to have been married and blessed in first marriage with Maria Francisca Antonia Lobato, deceased for forty-nine years, during which time we had the following children: Maria Manuela, Juana, Josefa, and Juan Angel, whom I recognize as my legitimate children and heirs.

84 Item. I declare as my property the house of my residence composed of four rooms, a parlor and three rooms, and its furniture, which consists of three chests, two good ones and an old one; two blankets, two pillows, four religious paper stamps, one wooden crucifix, three hoes, a large and two small ones, one axe.

Item. I declare to own a small orchard with fruit-bearing trees in a small piece of land contiguous to the house of my residence.

Item. I declare to own a piece of agricultural land, which is located near the Tenorios, as appears by the documents.

Item. I declare to own another ranch at the Llano de los Lobatos, as appears by its deeds.

Item. I declare to have at Santo Domingo in the possession of my grandson, Antonio Jose, an Indian of said Pueblo, twelve breeding goats.

Item. I declare that all that has been set forth constitutes everything that I recognize as my property.

Item. I declare that I do not owe anyone a single dime.

Item. I declare that Juan Cruz Aragon owes me twenty-four dollars, which will be proven by the witness, a son of Juan Cristobal Sanchez. I order my heirs to collect them. Isidro de Lona also

owes me eleven dollars, balance for a lot which I sold him, on which he paid me on account seven dollars. Don Dolores Madrid owes me one fanega of wheat. Don Perfecto Salazar, two cows. Buslometro Baldes, of the State of Sonora, owes ten dollars two reals in cash.

Item. I declare as my property two razors.

Item. I order that the house of my residence after my death be left to my two daughters, Juana and Maria Josefa, leaving to my two sons the two corrals and the old house lot, in order that they may build upon it.

Item. The heirs of Jose Maria Paez owe ten dollars and two reals, balance for a lot of twenty-four varas, at one dollar a vara, and I received from the deceased thirteen dollars six reals, which shall go into the mass of my property.

Item. I order that all that is recognized as my property, outside of what is set apart for my daughters, be divided in equal parts among my four sons and legitimate heirs.

Item. I declare that I have never made any other will, and therefore it is my will that all the necessary force be given to this one.

85 Item. It is my will that my executors be, in the first place, Don Juan Ortiz; in the second, Don Eugenio Sanchez, and in the third, Don Justo Pino, to whom I request and ask to comply and execute all that is set forth in my last testamentary disposition. And in order that this will may have all the necessary validity and force, I have caused to appear and asked the Sir 1st Alcalde of this city of Santa Fe, Don Gregorio Sanchez, to interpose his authority, and I, the present judge, stated that I would and did interpose my authority, being witnesses to the making of said will the citizens Esquipula Pacheco, Pomoseno Apodaca, and Miguel de Lona, who signed with me, the said judge, and the attending witnesses, according to law, to which I certify at Santa Fe on the 12th day of March, 1836.

SALBADOR LEYBA.

GREGORIO SANCHES.

Witness:

ESQUIPULA PACHECO.

Witness:

MIGUEL DE LONA.
NEPOMOSENO APODACA.

Attending witness:

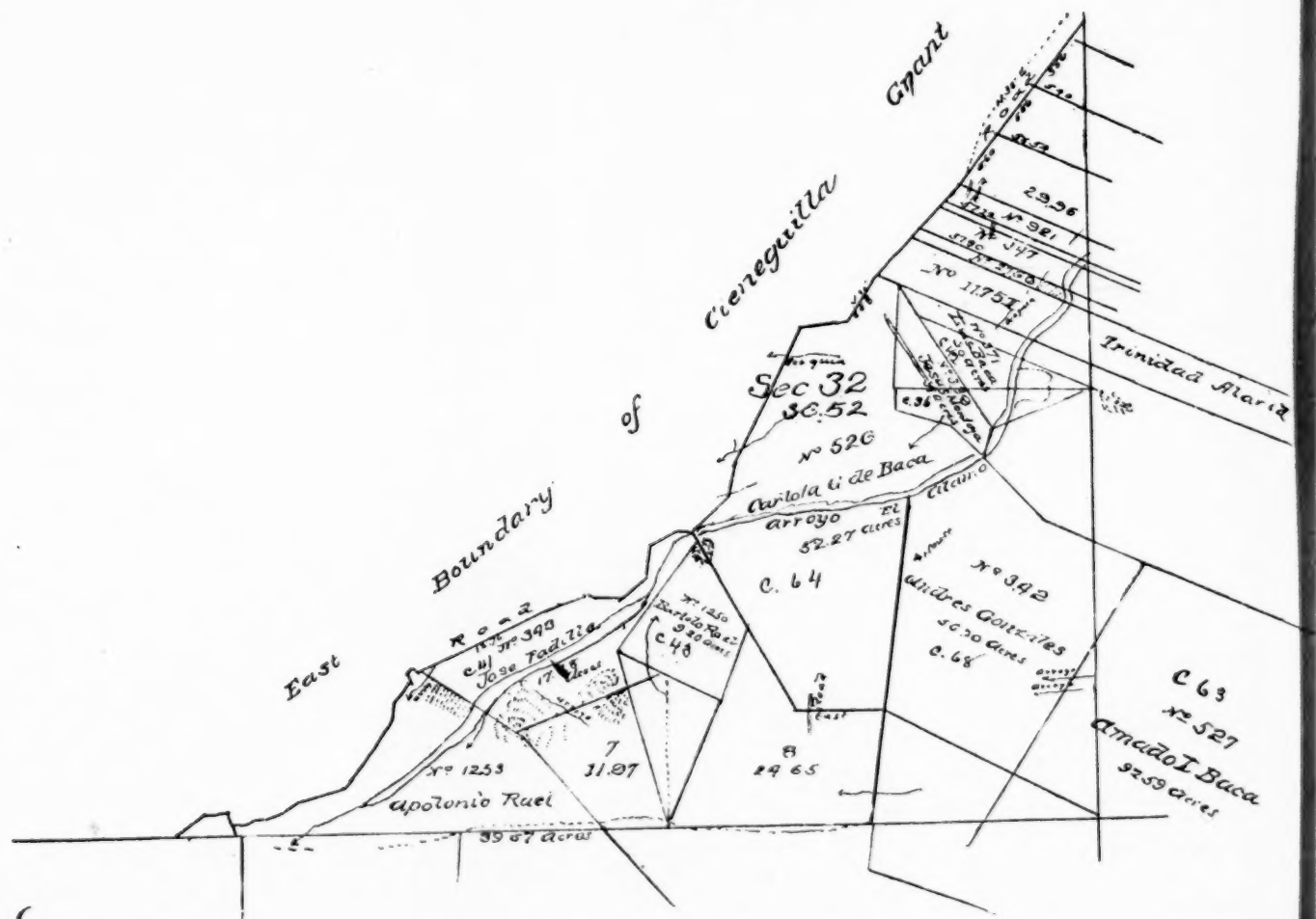
FRANCISCO ARCHIBEQUE.

Attending witness:

JORGE RAMIREZ.

S. 28, 31, 37 & 33 T. 16 N R. 8 E

Survey Comp. Fee
C. G. & Co. (Inc)
made out E Dec 21, 1895



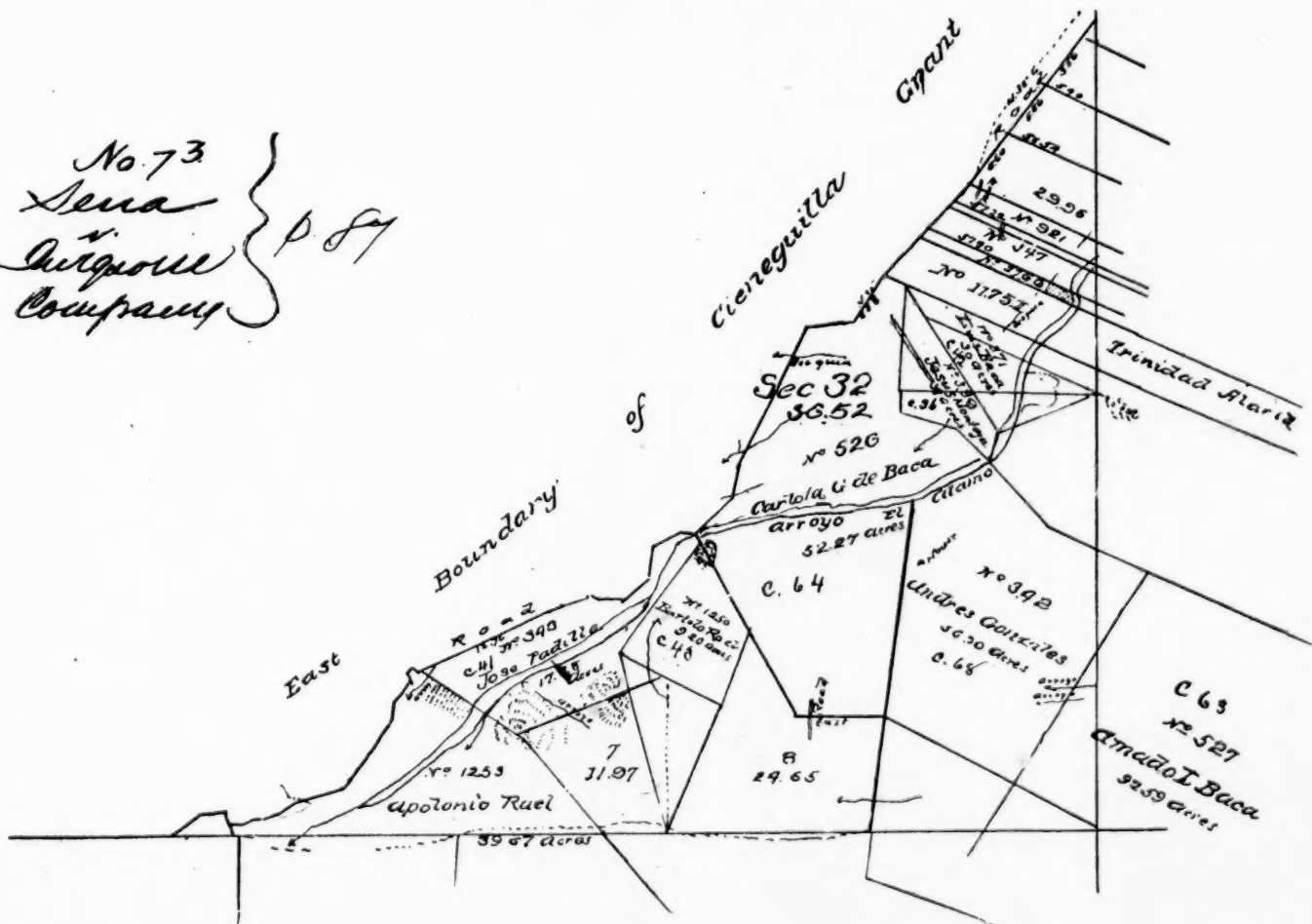
No. 73.
Sena } p. R
Purquon }
Company }

Plot showing Small Holding Claims

Secs 28, 31, 37 & 39 T. 16 N R. 8 E

Survey Contd
C. G. & D. (K)
was done E Dec 21, 1895

No. 73
Sena
v.
Autgrouse
Company } p. 87



FREDERICK MULLER, SWORN.

Direct examination by Mr. F. W. CLANCY:

Q. What is your name?

A. Frederick Muller.

Q. What, if any position do you occupy?

A. Receiver of the United States Land Office.

Q. Is there on file in the land office any plats showing surveys of lands in the vicinity of La Cienega, about fifteen miles from Santa Fe?

A. Yes, there has been an official survey.

Q. Have you brought those plats with you?

A. Yes, sir; I have. Township 15 north, Range 8 east, and Township 16 north, Range 8 east.

Mr. CLANCY: This is a plat showing small holdings and claims in Sections 28, 31, 32 and 33, Tp. 16 north, Range — east, and in Sections 4 and 5, Tp. 15 north, Range 8 east, surveyed by John H. Walker, in 1894.

ANDRES C. DE BACA, recalled.

Direct examination by F. W. CLANCY.

88 Q. You stated yesterday that you knew the location of the Penasco Blanco de los Golondrinas?

A. Yes, sir.

Q. Do you know upon whose land or near whose land that natural object is?

A. Most of the Penasco Blanco de los Golondrinas must be on the land of Carlota Gonzales de Baca, and part of it on the land of Bartolo Rael.

Q. Can you point out on that plat lying on the table the places where the Penasco Blanco is?

A. To the best of my knowledge this must be the Penasco Blanco de los Golondrinas. This is the land of Bartolo Rael (pointing same out on plat lying on table in front of judge and jury. (Witness) And this is the land of Carlota Gonzales de Baca.

Mr. CLANCY: The witness pointing to a point drawn on the map as apparently a little hill which is near the north corner of the land of Bartolo Rael, and on the line between that and an adjoining piece of land, the same being the land of Carlota Gonzales de Baca, the same being in Section 32, Tp. 16 north, Range 8 east.

Mr. CLANCY: I offer this plat in evidence. This is the plat identified by Mr. Muller—and we will furnish a copy for the record hereafter.

The plat was marked Plaintiff's Exhibit L.

(Here follow maps marked pp. 86 & 87.)

EXHIBIT L.

Cross-examination by Mr. REYNOLDS:

Q. Did you ever see this plat before this morning?

A. Yes, I saw it before.

Q. When did you examine it before?

A. I examined it about a quarter to nine o'clock this morning.

Q. You located the Penasco Blanco without any trouble on it?

A. Yes, sir.

Q. By what method of reasoning or how did you happen to locate that particular point as the Penasco Blanco, with reference to the balance of this property, no name being mentioned on it?

A. I am well acquainted with all of the land all around there.

Q. Does this plat show the lay of the land?

89 A. Yes, sir.

Q. It does?

A. To the best of my knowledge, it does.

Q. Well, there is another peak or elevation shown on this map. I wish you would tell me what it is. You say you understand the lay of the land, etc.,—that is this point here. (Pointing to place at southwest corner of the claim No. 342.)

A. That must be a small hill that is on the south line of the lands of Andres Gonzales.

Q. What is its name?

A. We call the place all around there Los Golondrinas.

Q. That is the name of the place generally?

A. Yes, all that place around there.

Mr. CLANCY: Has that particular hill any particular name?

A. It is a hill on the boundary of the land of Andres Gonzales.

Mr. REYNOLDS:

Q. Can you tell me in what section and township the hill that you call the Penasco Blanco is located under the government survey?

A. Section 32, I think.

Q. Well, do you know?

A. (Looking at plat:) Yes, it is in Section 32.

Q. Now in what part of the section, middle, northern, southern, eastern or western portion of it?

A. (Looking at plat:) It must be about the middle more or less. About the middle of Section 32 more or less.

Q. Is Section 32 laid down on that map?

A. Part of it is I think. This is the line of Section 32.

Q. Well, is that hill of Penasco Blanco located on the small holding or claim of any one, and if so, who?

A. Part of it is in the small holding claim of Carlota Gonzales de Baca, and I think there is a small holding and claim Bartolo Rael, as I understand the lines there.

Q. Are you familiar with the public surveys down there, the section lines and sections?

A. Not very much, but some of it.

Q. You know it in a general way?

A. Yes, in a general way I can tell something about it, but I know every piece of land and to whom it belongs.

90 Q. You have been familiarizing yourself with the land down there, the location, of natural objects with reference to the lines of these land grants?

A. Yes, sir.

Q. You have been doing that haven't you recently?

A. Yes, sir.

Q. Have you been familiarizing yourself with the lines of public surveys with reference to these objects?

A. I am, not very familiar with the lines of the public surveys.

Q. Aren't there section corners down there?

A. I can tell two section corners down there. I can show two of them, but not all of them.

Q. What sections are they?

A. Section 5, Township 15.

Q. Which corner?

A. I can show the southwestern corner of that section.

Q. The southwestern corner of Section 5, Tp. 15, Range 3 east?

A. Yes, sir.

Q. You know where that is—that is there is it?

A. Yes, sir.

Q. What corner is it?

A. Southwest.

Q. How far is that from the Penasco Blanco?

A. It must be to the best of my knowledge about a mile from the Penasco Blanco, more or less.

Q. Do you know the lines and corners of the Cerrillos grant?

A. No, I have not seen the corners of the Cerrillos grant.

Q. Do you know its location?

A. Yes, I know the land.

Q. Does it come up to Section 5, the north end of it?

A. I don't think it does.

Q. How near to it?

A. It must be about a half a mile, more or less.

Q. Do you remember when that was surveyed the last time?

A. No, sir.

Q. Do you know the Canada del Guicu?

A. Yes, sir.

Q. And the lands of the Bacas?

A. Yes, sir.

91 Q. Where are they located with reference to Section 5 and Section 32?

A. Canada del Guicu is in Section 5, Tp. 15 north, Range — east.

Q. How near the south line of Section 5?

A. From the creek to the south line of the Canada del Guicu it must be about a half a mile more or less.

Q. Do you know the length of a section—how long it is across each way?

- A. A mile, is it not?
- Q. Yes, just a mile. Do you know where Cerrillos Peak is?
- A. Yes, sir.
- Q. What section is that in?
- A. I don't know as I can tell that.
- Q. Do you know where the Delgado ranch is?
- A. Yes, sir.
- Q. Is that in the Cerrillos grant?
- A. Yes, sir.
- Q. Do you know whether the Cerrillos Peak is in the Cerrillos grant?
- A. I think it is.
- Q. Do you know whether Bonanza is in the Cerrillos grant or not?
- A. It is.
- Q. Do you know whether Los Cerrillos is in the Cerrillos grant or not?
- A. That is the same as I know as the Delgado ranch—it must be in the Cerrillos grant.
- Q. Is Los Cerrillos in the Cerrillos grant?
- A. I don't know whether Los Cerrillos is in the Cerrillos grant.
- Q. What direction is Los Cerrillos from Bonanza?
- A. Well, that is the same place.
- Q. I don't mean the whole grant, I mean the place called Los Cerrillos—what direction is that from Bonanza?
- A. Bonanza is in the Cerrillos grant.
- Q. What direction is the settlement of Cerrillos from Bonanza?
- A. The settlement of Los Cerrillos is what they call Bonanza—the houses that are on the eastern part of the Cerrillos grant.
- 92 Q. In what section is Bonanza?
- A. I don't know.
- Q. Do you know anything about Section 8?
- A. No, sir.
- Q. Do you know anything about Section 9, or Section 4?
- A. No, sir.
- Q. Know anything about Section 16?
- A. No, sir.
- Q. Section 17?
- A. No, sir.
- Q. Section 21?
- A. No, sir.
- Q. In other words, you don't know anything about sections of land in Township 15, Range 8 east, except No. 5, about which you have testified, the southwest section corner?
- A. I know that because I own land in that section.
- Q. You own land in Section 5?
- A. Yes, and in Section 6 also.
- Q. Section 6 is located near the Church of La Cienega?
- A. The new church of La Cienega is in Section 5.
- Q. I am speaking of the church of La Cienega and the lands of La Cienega—they are located in Section- 5 and 6.

A. In Section- 5 and 6. The church is in Section 5 near to the line between Sections 5 and 6.

Q. The church is not in Section 6 or 5 either?

A. Yes, it is in Section 5.

Q. The Old Church?

A. No, sir; not the old church—it is west of Section 5.

Q. It is not just west of the north and south line of Section 6?

A. The old church is west of Section 6, in another township.

Q. I show you a plat of the Cerrillos grant, which is an approved plat under the confirmation of the court of private land claims, of the Los Cerrillos grant, and I ask you if the location of that north line of this plat is substantially correct with reference to the south line of Section 5? (Showing witness a plat fastened in a book looking like a law book.)

A. It seems to be.

93 Q. Look at this map and see if what is known as the Los Cerrillos Peak is about correctly located (showing witness a map in the book)?

A. Do you mean the peak that is alone on the west or the other peak that is to the east?

Q. I don't know about that. There is laid down on that map a survey and approved by the court of private land claims—an object known as the Cerrillos Peak.

A. Yes, this we know as the Cerrillos Peak, and these are the hills running from it, called the "Cerrillos A——(?)

Q. Now that plat, according to your information, is in general conformity with the conditions in the country and the topography or location of the hills and streams and ranches on it, as put down by the surveyor, are substantially correct (referring to map in book)?

A. Yes, they seem to be.

Q. Do you know a place down in that country called the Turquoise Peak?

A. Yes, sir.

Q. Where is that located?

A. That is south of Bonanza, I think a little east of south of Bonanza.

Q. How long have you known the Turquoise Peak?

A. I have known that place since 1869.

Q. Do you know whether or not the general location as related on this Los Cerrillos grant and the Turquoise Peak, are substantially correct, approximately and relatively?

A. I think they are.

Q. Has that any other name or Spanish name? Do you know it down there in that country by any Spanish name which means Turquoise?

A. I knew it before by the name of "El Cerro Chalchaguite."

Q. That is Spanish for Turquoise?

A. That is the Indian name.

Q. You have known the Peak since 1869?

A. Yes, sir.

Redirect examination by Mr. CLANCY:

Q. In which section down there do you live?

A. My house is in Section 6, near the line of Section 5.

Q. How long have you lived in that place?

A. I have lived in the new house since 1890.

94 It is here stipulated and agreed by counsel that all of Section 32, as shown on that map may be made by Mr. Frederick Muller, instead of making the entire plat.

FELIPE PINO sworn.

Direct examination by Mr. F. W. CLANCY:

Q. Examine this paper and state whether you have ever seen it before, and state whether it has ever been in your possession?

A. Yes, I have had it.

Q. How did it come into your possession?

A. That paper came into my possession when my sister-in-law died at Rael de Dolores. She went there to have a child, and the papers remained at my house, the papers which belonged to herself and to her husband. A long time afterwards, looking over her business, I saw that paper, and I told my wife—Here is a paper which my father made of the obligation which was made by Josefa Leyba, placing to her certain lands. That is what the paper said, and that is the way it remained in my power or under my control.

Q. You spoke of your sister-in-law and her husband, what were their names?

A. Juanita Alarid and Salvador Leyba, her husband.

Q. Do you know the handwriting in which this paper is made?

A. Yes, sir.

Q. In whose handwriting is it written?

A. It was written by my father.

Q. What was your father's name?

A. Jose M. Pino.

Mr. CLANCY: I offer this paper in evidence, of which we present a copy and translation, marked Plaintiff's Exhibit M.

(Translation.)

TERRITORY OF NEW MEXICO,
SANTA FE, March 7, 1855.

I, Josefa Leiva, declare that I promise Don Jose Pino to pay the sum and quantity to me delivered which are forty dollars which he has loaned me upon the pledge of the grant of the Collote Spring belonging to Salvador Leiva, my nephew, inheritance of my nephew from Juan Angel Leiva his father for the term of three months with interest of one real on each dollar, and if at this time
95 through any cause I fail to pay said sum the said mortgaged grant shall belong to the said Senor Pino. For its validity I have signed this before two witnesses.

JOSEFA LEIBA X

TOMAS ENSINAS X
MIGL. ARCHULETA X

Mr. DAVIS: We object to the instrument on the ground the execution of it is not proven, and secondly, in so far as it is attempted to show by this instrument that the grant at this time belonged to Salvador Leyba, that it is incompetent, immaterial and not the proper way to prove any such fact. The instrument is not acknowledged and all the witnesses sign by a mark, and there is no proof of its execution.

The COURT (looking at the document): I don't see that this proves anything.

Mr. CLANCY: The manifest object of this is to still further identify Josefa and Salvador Leyba with this property and with this grant. It does not show ownership, but it identifies these people.

The COURT: I think you have got them pretty well identified. I don't think I will admit this exhibit.

Mr. CLANCY: Will Your Honor note our *first exception*?

Mr. CLANCY:

Q. I will ask you to examine these pieces of paper and state whether you have ever seen them before or had them in your possession (handing witness some old pieces of paper).

A. No, sir.

Q. Did you ever see those papers before?

A. I have seen them, but I never had them in my possession.

Q. When and where did you see them?

A. I don't remember when I saw them, but I saw them here in Santa Fe.

Q. In whose possession were they when you saw them?

A. I saw them in the possession of Andres Baca.

Q. This Andres Baca who has testified here?

A. Yes, sir.

Q. How long ago was that?

A. I don't remember.

Q. Was it a long time ago or was it yesterday?

A. Not very long ago.

Q. Within this year?

A. I saw them this year.

Q. You never saw them before this year?

96

A. No, sir.

Q. When you saw these papers, did you do anything with them, or have anything to do with them?

A. No, sir.

Q. Do you know a woman named Juana Baca?

A. I knew her. She is dead now.

Q. How long ago did she die?

A. On the 25th of August, a year ago.

Q. Did you ever examine or see any papers that belonged to Juana Baca?

A. Yes, sir.

Q. When was that?

A. About a year or two before she died.

Q. Did you ever know of a man named Francisco Tenorio?

A. No, sir.

Q. Did you ever hear of him, or know who he was?

A. Yes, I knew who he was.

Q. Where did he live?

A. He lived here in Santa Fe, but I don't know the place.

Q. Now I will ask you to examine these pieces of paper again and say whether when you said they were in the possession of Andres Baca, whether you were not confusing them with some other papers?

A. (Witness here took the papers and looked at them for some time.) I believe I brought these from some papers myself, but I do not understand writing very well. I understand and I believe I found these papers among the papers of this woman Juana Baca.

The COURT:

Q. You say you never saw them before this year?

A. I had seen them, but I don't understand writing well.

Mr. CLANCY:

Q. What did you do with the papers after they came to your hands?

A. I turned them over to Don Mariano Sena, thinking they might be of some use to him.

Q. Can you state positively one way or the other whether the papers which you delivered to Mariano Sena were papers which you had found among the effects of Juana Baca?

A. Yes, they are. I recollect that on account of the dilapidated condition of the spots on the paper.

97 The COURT:

Q. When did you deliver them to Mariano Sena?

A. More than a year ago.

Q. Why did you say awhile ago that you had never seen these papers until this year?

A. I did not remember until I noticed them well now.

The COURT: It seems to me anybody who ever saw that dilapidated paper would remember it.

Mr. CLANCY: A large number of these papers are in that condition.

Mr. CLANCY:

Q. Now was Juana Baca related in any way to the Tenorios?

A. I don't know.

Q. Do you know whether she was related to the Leybas?

A. I don't know a single word about that.

Mr. CLANCY: Unless I can identify Juana Baca more, I don't believe I can introduce this paper. I will see if I can get some information about that.

A recess was here taken by the court until two o'clock p. m. Tuesday, August 29th, 1905.

Afternoon Session.—2 P. M.

Mr. CLANCY to Court: I now offer in evidence, deed from Salvador Leyba to Mariano Sena, the plaintiff herein, of which we present a copy to be marked Plaintiff's Exhibit N.

Mr. DAVIS: We make the formal objection to the instrument that the relationship of Salvador Leyba to the original grantee is not sufficiently proven, nor is there any proof at the time of the making of the deed, Salvador Leyba was the owner of the real estate involved in this case.

Objection overruled by the court.

Exception reserved by defendants' counsel.

Mr. Clancy here read to the court and jury, Plaintiff's Exhibit N.

This deed, made this sixteenth day of August, in the year of Our Lord, one thousand eight hundred and ninety-five, between Salvador Leiba, son of Juan Angel Leiba and Ines Apodaca of the County of Bernalillo and Territory of New Mexico, of the first part, and Mariano F. Sena of the County of Santa Fe and Territory of New Mexico, of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the county of Santa Fe and Territory of New Mexico, to-wit: All his right, title and interest, in and to that certain grant of land, made to Jose Leiba on the 25th day of May, A. D. 1728, by the then governor of the province of New Mexico, bounded as follows: On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas; and on the north by lands of Sebastian de Vargas.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder or remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances unto the said party of the second part, his heirs and assigns forever. And the said Salvador Leiba, party of the first part, for his heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the en-sealing and delivery of these presents, he is well seized of the premises above conveyed, as of good, sure, perfect, absolute, and inde-feasible estate of inheritance in law, in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell and

convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, assessments and incumbrances of whatever kind or nature soever; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming.

99 or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

his
SALVADOR X LEYBA. [SEAL.]
mark

Signed, sealed and delivered in the presence of
MANUEL BACA Y CAMPOS.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 16th day of August, 1895, before me personally appeared Salvador Leiba, son of Juan Angel Leiba and Ines Apodaca, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.]

JOSE D. SENA,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

In the Recorders' Office.

I, A. P. Hill, probate clerk and ex-officio recorder of said county, do hereby certify that the within instrument of writing was, on the 18th day of September, A. D. 1895, at 10 o'clock and 30 minutes a. m., duly filed for record in this office, and is recorded in the records of this office, in Book "C" 1, at page 114, the same day.

In witness whereof, I have hereunto set my hand and affixed my official seal at Santa Fe, N. M., this 18th day of September, A. D. 1895.

[SEAL.]

A. P. HILL,
Probate Clerk and ex-Officio Recorder
By JESUS MA. ORTIZ Y BACA, *Deputy.*

MANUEL BACA Y CAMPOS, sworn.

Direct examination by F. W. CLANCY:

Q. What is your name?

A. Manuel Baca y Campos.

Q. Where do you reside?

100 A. Santa Fe.

Q. Examine this paper which appears to be a deed from Salvador Leyba to Mariano Sena, and state whose signature appears there as a witness?

A. This is my own name as witness.

Q. Is that your signature—did you sign that as witness?

A. Yes, sir.

Q. Were you present at the time the deed was signed?

A. Yes, sir.

Q. Were you personally acquainted with the grantor in this deed, Salvador Leyba?

A. Yes, sir.

Q. Is he living or dead now?

A. I understand that he is dead.

Q. How long ago did he die?

A. I don't recollect exactly, but it must be about seven years ago.

Q. Where did Salvador Leyba live?

A. At that time he was living in Santa Fe.

Q. Were you ever present at any conversation between Salvador Leyba and Mariano F. Sena, when they talked about the sale which is evidenced by this deed?

A. I was working at the house of Jose Sena when they called me to sign that deed.

Q. Who was present then?

A. Myself, Mariano Sena, Jose Sena and Salvador Leyba.

Q. Well, now, was there any conversation between Salvador Leyba and Mariano Sena at that time—did they talk to each other?

A. They had some conversation. Mariano Sena asked Salvador—

Mr. DAVIS: I object to the conversation on the ground it is hearsay.

Mr. CLANCY: I will modify my question.

Q. Did you hear any statements made by Salvador Leyba about his family?

A. Yes, sir.

Q. Well, tell us what he said on that subject?

A. He said that Jose de Leyba was the first of the family. That he had had a son named Simon Leyba, and Simon had another son whose name was Salvador Antonio Leyba, and Salvador Antonio

101 Leyba had a son whose name was Juan Angel Leyba, and Juan Angel Leyba had a son whose name was Salvador

Leyba, who made the deed or transfer.

Q. Did he say whether or not Juan Angel Leyba had any other children?

A. I think he said he had two girls. I don't remember exactly.

Q. How long had you been acquainted with Salvador Leyba?

A. I knew him about one year.

Cross-examination by Mr. REYNOLDS:

Q. You testified in the case of Mariano Sena against the United States, The American Turquoise Company and J. T. McNulty, in the Court of Private Land Claims, did you not?

A. I testified in this same case, just as I am testifying now, and to the same effect.

Q. Did you testify in the case of Sena et al., in the court of private land claims at the time the case was on trial in that court for confirmation of this grant?

Mr. CLANCY: I will admit that this is the same witness who testified in the court of private land claims as indicated by your question.

Mr. REYNOLDS:

Q. Did you testify in that case that Salvador Antonio Leyba was a son of Simon Leyba?

A. That Simon was the father of Salvador Antonio Leyba, Yes, sir.

Q. Did you testify in that case that Salvador Leyba, who was carrying on that conversation with Sena, and that he said that Salvador Antonio Leyba was a son of Simon Leyba?

A. No, sir.

Q. What did you testify, if you remember?

A. I only testified what I have just finished testifying now. That Simon was the father of Salvador Antonio Leyba.

Q. I will put this question to you—(Was this question asked you by Mr. Clancy as follows—reading from a printed transcript of the case in court of private land claims—Q. State if you can recollect, what took place at that conversation, and what was said by Salvador Leyba? A. I was working at Jose Sena's, when Mariano Sena and this man Leyba called me to sign that document or transfer as a witness, and I signed it, and Mariano Sena asked Salvador Leyba if there were any other heirs to that interest that he had bought, and

he said that Jose Leyba was the original party to that grant
102 and that Simon Leyba was a son of this man Jose Leyba.

Salvador Leyba was a son Simon Leyba, and that Juan Angel was a son of Salvador Leyba and Salvador Leyba was a son of Juan Angel—that is all I heard.” Is that correct?

A. Yes, sir.

Q. Why do you now say the statement was made that Salvador Antonio Leyba was the son of Simon Leyba?

A. Because Jose Leyba was the father of Simon, and Simon Leyba was the father of Salvador Antonio Leyba. Juan Angel was the son of Salvador Antonio Leyba, and Juan Angel Leyba was the father of Salvador Leyba.

Q. When was your attention called to the fact that Salvador Antonio Leyba and not Salvador Leyba, was the son of Simon Leyba?

A. My attention was called then to Simon Leyba and then to Salvador Antonio Leyba and then to Juan Angel.

Q. Wasn't your attention called to it since this case come on trial?

A. No, sir—when they asked him if there were any more heirs.

Q. How did you happen to omit the name "Antonio" in giving the conversation between Mariano Sena and Salvador Leyba at the time the deed was made—as shown in this record?

A. I supposed that they knew his name was Salvador Antonio—who was the grandfather of Salvador.

Q. How long did this conversation between Mariano Sena and Salvador Leyba last at the time the deed made? How long did it take them to have this conversation about his family?

A. It took about ten minutes.

Q. Have you talked to anybody since about that conversation?

A. Not that I remember of.

Q. Haven't you talked to Mariano Sena or Mr. Clancy about that conversation since?

A. I may have.

Q. Haven't you as a matter of fact?

A. Not with Mr. Clancy.

Q. Did you talk with Mr. Sena?

A. He only told me they were going to bring the case up again.

103 Q. Has neither Sena or counsel or anybody else called your attention to the omission of the name "Antonio" in the name of Salvador Leyba, so as to distinguish between the son of Simon Leyba and son of Juan Angel Leyba?

A. No, sir.

Q. Was there any other heirs mentioned at the time that conversation took place?

A. Not that I remember of.

Redirect examination by Mr. F. W. CLANCY:

Q. When you testified in the court, of private land claims, did you say that the son of Simon Leyba was Salvador Leyba, or did you say that he was Salvador *Antonio* Leyba?

A. I believe so.

Q. Well, which did you say at that time?

A. I said it was Salvador Antonio Leyba.

Q. Is it your recollection that that is what you said at that time in that court?

A. Yes, sir.

ELIGIO SEDILLO, SWORN.

Direct examination by Mr. F. W. CLANCY:

Q. State your name?

A. Eligio Sedillo.

Q. Where do you reside?

A. I live on San Francisco Street, Santa Fe.

Q. How long have you lived here in Santa Fe?

A. Since I was born.

Q. How old are you?

A. I am seventy-five years of age.

Q. Do you know a spring south of Santa Fe called Coyote Spring?

A. Yes, sir.

Q. How long have you been acquainted with that spring?

A. I have known it since the year 1853.

Q. Do you know wher- the San Marcos Spring is?

A. Yes, sir.

Q. How far is the Coyote Spring from the San Marcos Spring?

A. About one and a half miles.

Q. How is the Coyote Spring situated on the ground—in what kind of a place is it?

A. There is an arroyo there—it is in an arroyo.

Q. Has that arroyo any name?

104 A. It is called Arroyo del Poleo.

Q. What is "Poleo?"

A. It is a *weed*.

Q. Did you see any signs of houses or habitations near the Coyote Spring when you first knew it?

A. Yes, sir.

Q. Describe them?

A. I saw something like a house.

Q. How large a house did it seem to be?

A. The walls were that high (indicating between three and four feet high.)

Q. How many rooms do you think there were in that house?

A. I did not go near to it to see. I used to pass by on the trail and go to the spring.

Q. Have you ever heard of a place called the Cuesta or Arroyo del Oregano?

A. I knew it.

Q. Well, where is the Cuesta del Oregano?

A. It is in front of the Ojo Coyote. Towards Ojo San Marcos.

Q. Do you know where the Arroyo of La Cuesta del Oregano is?

A. Yes, sir.

Q. Where is that?

A. It is south from the spring.

Q. From which spring?

A. Of the Coyote Spring.

No cross-examination by defendants' counsel.
Plaintiff rests.

Mr. REYNOLDS to Court: We desire to present to the court an instruction to the jury to find for the defendant, as follows:

"The court instructs the jury that under the pleadings and the evidence introduced, the plaintiff is not entitled to recover in this action, and your verdict will be for the defendant, and the court instructs the jury to return a verdict of not guilty as to the defendant, The American Turquoise Company."

August 29th, 1905.

Argument on this motion was heard by the court, and the same not being concluded at the hour of adjournment, an adjournment was taken until 9:30 a. m. Wednesday, August 30th, 1905.

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WEDNESDAY MORNING, August 30th, 1905.

The argument on motion of the defendant was continued and at its conclusion the court stated, as follows:

The COURT: Gentlemen: I want to think over this matter somewhat before passing on it, and I think I will let the defendant begin to put in its testimony. I will endeavor to decide the motion by tomorrow morning.

Thereupon the defendant proceeded with its case as follows:

Defendant's Case.

Mr. DAVIS: Before proceeding to introduce certain documentary evidence, I desire to call attention of the court and jury to the fact, that it is admitted by the pleadings in this case that in the year 1861, the United States government caused its surveys to be surveyed over the lands now claimed as the Jose de Leyba land grant, and in 1885 that land was thrown open to settlement by the United States government, by the order of its proper officers, and filed with the register and receiver of this land office.

As following that admission, I desire to introduce in evidence certain location notices, showing the taking up by various persons of the lands in controversy in this suit, which I will file with the introduction of other documents, bringing the title down to the defendant, in this case.

Mr. DAVIS: First, I desire to offer in evidence a certified copy of the location notice of the Castillian Lode Mining Claim.

Mr. CLANCY: I would suggest, while of course I am going to make objection to these, I suggest that they may be introduced by a mere statement of what they are, taken by the stenographer, to avoid the necessity of loading down the record with all these long copies of the papers.

Mr. DAVIS: That of course will be perfectly satisfactory to us.

Mr. DAVIS: The first instrument I offer in evidence is the certified copy of notice of location filed in the office of the probate clerk of Santa Fe county, on the 22nd day of June, 1885, 9:30 o'clock in the morning, locating the Castillian Quartz lode mining claim, and being the location notice of the mine of that name set out in the complaint, located by M. K. Parmalee on the 1st day of April, 1885.

Marked Defendant's Exhibit No. 1.

Mr. DAVIS: Second, the certified copy of the location notice
106 of the Muniz as filed in the office of the probate clerk of Santa Fe county, on the 1st day of February, 1890, at 1:30 o'clock p. m., showing the location of the mine known as the Muniz mine and declaring it was located on the 31st day of January, 1890, by Pedro Muniz and Faustin Muniz, locators.

Marked Defendant's Exhibit No. 2.

Mr. DAVIS: Third, I offer in evidence a certified copy of the location notice of the Morning-Star Lode, as filed in the office of the probate clerk of Santa Fe county, on the 24th day of August, 1891, at 2 o'clock p. m., declaring the location of the Morning-Star lode, on the 2nd day of June, 1891, by J. M. Allen.

Marked Defendant's Exhibit No. 3.

Mr. DAVIS: I next offer in evidence a certified copy of the location notice of the "Sky-Blue Turquoise lode, as filed for record in the office of the probate clerk of Santa Fe county on the 18th day of March, 1892, reciting the location of the Sky-Blue Turquoise lode, on the 2nd day of November, 1891, by C. G. Storey, locator.

Marked Defendant's Exhibit No. 4.

Mr. DAVIS: Certified copy of the location notice of the Gem Lode, as filed for record in the office of the probate clerk of Santa Fe county, on the 24th day of August, 1891, reciting the location of that lode on the 2nd day of June, 1891, by C. G. Storey, locator.

Marked Defendant's Exhibit No. 5.

Mr. CLANCY: The plaintiff objects to the admission of each of the location notices on the ground that they are not material or relevant to any issue made by the pleadings in this case, and that no valid mining location could be made on these lands so as to give the locators and their successors in title any legal rights.

Objection overruled by the court.

Exception reserved by plaintiff.

Mr. DAVIS: I now offer in evidence a certified copy of a quit claim deed made by M. K. Parmalee as grantor to H. B. Cartwright, as grantee, dated February 19th, 1889, and acknowledged on February 20th, 1889, before George W. Knaebel, notary public of Santa Fe county, in consideration of the sum of one thousand dollars, conveying to the grantee "The Castillian Quartz Lode Mining Claim," as described in the location notice of that claim heretofore introduced. Recorded in the office of the probate clerk of Santa Fe county on the 15th day of April, 1889, in Book H, record of mines, page 608.

Marked Defendant's Exhibit No. 6.

Mr. CLANCY: Plaintiff objects to the introduction of the deed in evidence for the same reasons as those upon which objection was made to the introduction of the location notices.

And it may be stated here that the same objection is to be considered made to all the deeds that the defendant is now introducing in evidence, so as to make one ruling and exception.

Objection overruled.

Exception reserved by plaintiff's counsel.

Mr. DAVIS: I now offer in evidence a mining deed, Hiram B. Cartwright as grantor to Eleanor A. Allen, a resident of the county of Cook, state of Illinois, dated April 23rd, 1890, acknowledged April 23rd, 1890, before George W. Knaebel, notary public for Santa Fe county, and recorded April 23rd, 1890, in Book I, records of mining deeds, page 18, Santa Fe county, N. M., and conveying to the grantee the Castillian Quartz Lode mining claim, as described in the mining location heretofore introduced.

Marked Defendant's Exhibit No. 7.

Mr. DAVIS: I now offer in evidence a mining deed made by Pedro Muniz and Faustin Muniz, to Eleanor Story Allen of the county of Cook, and state of Illinois, dated May 7th, 1891, acknowledged before Edward L. Bartlett, notary public, Santa Fe county, New

Mexico, and recorded May 8th, 1891, Book I, page 506, mining deeds, records of Santa Fe county, New Mexico, conveying to the grantee, a portion of the mining claim and location known as the Muniz mine, as described in the location notice heretofore introduced, conveying 205½ feet off the east end of said lode.

Marked Defendant's Exhibit No. 8.

Mr. DAVIS: I now offer in evidence a mining deed of Pedro Muniz and Martina Quintana, his wife, and Faustin Muniz and Rufina Baca, his wife, to Eleanor Allen, of Chicago, Ill., dated November 20th, 1891, acknowledged before Austin L. Kendall as notary, on the same date, and filed for record on the 18th day of December, 1891, and duly recorded in the records of Santa Fe county, New Mexico, in Book I, records of deeds, page 563, conveying to the grantee all their right, title and interest of the parties of the first part, in and to the mining location known as the Muniz mine, according to the location notice before introduced, 108 and specifically conveying the remaining portion of the mine not conveyed by the deed heretofore introduced.

Marked Defendant's Exhibit No. 9.

Mr. DAVIS: I now offer in evidence a mining deed of A. H. Allen, James M. Allen, and Eleanor A. Allen, to Chauncey G. Storey, of the county of Santa Fe, Territory of New Mexico, dated January 27th, 1892, duly acknowledged before John D. Allen, a notary public, on the 27th day of January, 1892, and filed for record in the office of the probate clerk of Santa Fe county on the 3rd day of May, 1892, and recorded in Book J of mining deeds, page 23, conveying to the party of the second part the following mining claims:

The Castillian Mine Quartz Lode claim as described in the location notice of said claim already introduced.

The Morning-Star Lode, as located by J. M. Allen, and described in the location notice already introduced.

Marked Defendant's Exhibit No. 10.

Mr. DAVIS: I next offer in evidence a mining deed made by Eleanor Storey Allen and ——— to Chauncey G. Storey of Cerillos, New Mexico, dated January 27th, 1892, acknowledged on the 27th day of January, 1892, before John D. Allen, notary public of Santa Fe county, New Mexico, and filed for record on the 27th day of January, 1892, in the office of the probate clerk of Santa Fe county, New Mexico, recorded on the same date in Book J, records of mining deeds, page 601, and conveying to the party of the second part the Muniz mine, according to the location notice of said mine already introduced in evidence.

Marked Defendant's Exhibit No. 11.

Mr. DAVIS: I next offer in evidence a mining deed made by C. G. Storey, to the American Turquoise Company, a corporation, organized under the laws of the State of Illinois, dated March 5th, 1892, acknowledged before J. Edward Fry, notary public of the State of Illinois, county of Cook, on the 5th day of March, 1892, and filed for record in the office of the probate clerk of Santa Fe county on the 19th day of March, 1892, and recorded on same date in Book I, page 603, records of mining deeds of Santa Fe county; conveying

to The American Turquoise Company, The Old Castillian Mining claim, according to the location notice of said mining claim already introduced in evidence; also, the Morning-Star mining claim according to the location notice of said Morning-Star mining claim already introduced in evidence; also the Muniz mine, according to the location notice of said mining claim already introduced in evidence.

Also the Gem mining claim, according to the location notice of said claim already introduced in evidence.

And also conveying the mining claim known as the Sky Blue mining claim according to the location notice of said mining claim as already introduced in evidence.

Marked Defendant's Exhibit No. 12.

Mr. CLANCY: As to this last deed, I desire to make a special objection that the grantee, being a foreign corporation, no showing is made that it had complied with our laws so as to be authorized to do business in the Territory of New Mexico, or to purchase or hold real estate in the Territory of New Mexico.

Objection overruled by the court.

Exception reserved by plaintiff.

Mr. DAVIS: I next offer in evidence a deed of Chauncey G. Storey of Cerrillos, New Mexico, to The American Turquoise Company, a corporation, organized under the laws of the State of Illinois, dated January 27th, 1892, acknowledged on January 27th, 1892, before John D. Allen, a notary public of Santa Fe county, New Mexico, and filed for record in the office of the probate clerk on the 27th day of January, 1892, and recorded in Book J, of mining deeds on page 13, conveying to The American Turquoise Company of Illinois, the Muniz mine, as described in the location notice of said mine already introduced in evidence.

Marked Defendant's Exhibit No. 13.

Mr. CLANCY: To this deed the same special objection is made as to the last one.

Objection overruled.

Exceptions reserved by plaintiff.

Mr. DAVIS: I now offer in evidence a deed of trust of The American Turquoise Company, a corporation created and existing under the laws of the State of Illinois, to The Farmer's Loan and Trust Company, a corporation created and existing under the laws of the State of New York, dated June 6th, 1892, conveying to The Farmers' Loan and Trust Company, the mining claim known as the Old Castillian, according to the location notice of said mine, already introduced in evidence; the mining claim known as the Morning-Star according to the location notice of said claim already introduced in evidence.

The mining claim known as the Muniz mine, according to the location notice already introduced in evidence.

The mining claim known as the Gem, according to the location notice of said mining claim, already introduced in evidence.

The mining claim known and described as the Sky-Blue mining

claim, according to the location notice of said mining claim, already introduced in evidence.

In trust, to secure Bonds to the amount of two hundred and fifty thousand dollars, acknowledged on the 6th day of June, 1892, before Edward B. Lafatre, notary public, in the county and state of New York, and duly recorded in the office of the probate clerk and ex-officio recorder for Santa Fe county, New Mexico.

Marked Defendant's Exhibit No. 14.

Mr. CLANCY: We desire to make the same special objection to the introduction of this deed of trust.

Objection overruled by the court.

Exception reserved by plaintiff.

Mr. DAVIS: I next offer in evidence a deed of The American Turquoise Company, by J. H. Sutherlin, master, and commissioner, to Howard Carter, of the City of Chicago, and William R. Alling, of the county and state of New York, on the consideration of \$85,-481.52, as found and adjudged to be due in a certain legal proceeding on the deed of trust last introduced, and conveying the Old Castillian Mining Claim; the Morning-Star, Gem, Sky-Blue and Muniz mining claims, according to the location notices of said several mining claims heretofore introduced. Acknowledged before C. H. Gildersleeve, clerk of the district Court for the First Judicial District, Territory of New Mexico, on the 11th day of June, 1897; filed for record on same date in the office of the probate clerk for Santa Fe county, and recorded in Book K, mining deeds, page 63.

Mr. DAVIS (to Clancy): Do you desire me to introduce the court proceedings leading up to this?

Mr. CLANCY: Oh, no. I don't think it is necessary.

Marked Defendant's Exhibit No. 15.

Mr. DAVIS: I next offer in evidence a deed of W. R. Alling and Howard Carter, to The American Turquoise Company, a corporation organized under the laws of the State of New Jersey, dated June 6th, 1892, acknowledged before Will C. Clarke, notary public of the county of Cook, State of Illinois, on the 14th day of November, 1899, and before Cornealis A. Lighton, notary public for the city and county of New York, November 20th, 1899, filed for record in the office of the probate clerk and ex-officio recorder of Santa Fe county, on the 15th day of December, 1899, duly recorded in Book K, record of mining deeds at pages 337, and following; conveying and quit-claiming all the property, real and personal and mixed, conveyed to them by J. H. Sutherlin, master and commissioner, in chancery, by deed dated June 11th, 1897, recorded on the same day in Book K, record of mining deeds, at pages 67, and following—revenue stamps cancelled.

Marked Defendant's Exhibit No. 16.

Mr. CLANCY: I make the same special objection to this deed as to the other.

Overruled.

Exception by plaintiff.

Mr. CLANCY: I think I should say that no objection is intended

to be made on account of the non-production of the originals of any of these records.

Mr. REYNOLDS: We have another deed, of Howard Carter and Laura J. Carter, his wife, William R. Alling and — Alling his wife, to American Turquoise Company of New Jersey, mining deed, dated December 15th, 1899, recorded Feb. 13th, 1900, in Book K, record of mining deeds, pages 380 and following, conveying all and singular the following described mining claims and property situate and being in the county of Santa Fe, Territory of New Mexico. All *that* certain mining claims located and known as the Old Castillian, the Morning Star, the Meniz, the Gem and the Sky-Blue, all of which said claims are in the Cerrillos Mining District.

Marked Lefendant's Exhibit No. 17.

Mr. CLANCY: We make the same special objection to that.

Objection overruled.

Exception reserved by plaintiff.

Mr. DAVIS: I now offer in evidence a Notice to Hold, filed by The American Turquoise Company claimant, by J. P. McNulty, agent. For notice to hold and work in good faith the mining claim known as the Gem, as required by amendment 2224, Revised
112 Statutes of the United States, approved July 13, 1894, the same being recorded in December, Book No. 1, of the records of Santa Fe county, page 207.

Mr. CLANCY: We make the same objection to this as to the mining location notices and the special objection with regard to the American Turquoise Company.

Objection overruled.

Exception reserved by plaintiff.

Marked Defendant's Exhibit No. 18.

Mr. DAVIS: Next I offer a notice to hold and work in good faith the mining claim known as the Morning Star, as required by said amendment to the Revised Statutes, recorded December 24th, 1894, Book 1, Proof of Labor, filed by the American Turquoise Company, J. P. McNulty, its agent.

Mr. CLANCY: To which we make the same objection.

Overruled. Exception.

Marked Defendant's Exhibit No. 19.

Mr. DAVIS: I next introduce notice to hold and work in good faith mining claim known as the Castillian, recorded December 24th, 1894, Book 1, proof of labor, page 208.

Same objection by Mr. Clancy.

Objection overruled.

Exception reserved.

Marked Defendant's Exhibit No. 20.

Mr. DAVIS: I now introduce a notice to hold and work in good faith the mining claim known as the Sky Blue mining claim, recorded December 24th, 1894, Book 1, proof of labor, filed by the American Turquoise Company by J. P. McNulty, agent.

Objected to for same reasons by defendant's counsel.

Objection overruled.

Exception reserved.

Marked Defendant's Exhibit No. 21.

Mr. DAVIS: Next I offer in evidence proof of labor for the year 1896, of the Old Castillian, Morning Star, Muniz, Gem, and Sky Blue mining claims, recorded in Book 1, record of proof of labor, Santa Fe county, page 384, 21st day of Aug., 1897, reciting the doing of the annual work for the year 1896 as required on the said mining claims for the American Turquoise Company, by J. P. McNulty, agent.

Objected to by plaintiff's counsel for the same reasons heretofore stated.

Objection overruled.

113 Exception reserved.

Marked Exhibit No. 22.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1897, of the Morning Star mining claim, filed by the American Turquoise Company, through J. P. McNulty, its agent, on the 31st day of December, 1897, recorded in Book 1, record of proofs of labor, page 396.

Objected to for same reasons by counsel for plaintiff.

Overruled.

Exception.

Marked Defendant's Exhibit No. 23.

Mr. DAVIS: Proof of labor for the year 1897 on the Muniz mining claim, filed by the American Turquoise Company, through J. P. McNulty, its agent, on the 31st day of December, 1897, recorded in Book 1, record of proof of labor, page 396.

Objected to for reasons heretofore stated by counsel for plaintiff.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 24.

Mr. DAVIS: Next introduce proof of labor for the year 1897 on the Sky Blue mining claim, filed by the American Turquoise Company, through J. P. McNulty, its agent, recorded in Book 1, proof of labor, of Santa Fe county, at p. —.

Objected to for same reasons by counsel for plaintiff.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 25.

Mr. DAVIS: Next introduce proof of labor for the year 1897 of the Old Castillian mining claim, filed by the American Turquoise Company through J. P. McNulty, its agent, recorded in Book 1, record of proof of labor, Santa Fe county, page 395 on the 31st day of December, 1897.

Objected to for same reasons by counsel for plaintiff.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 26.

Mr. DAVIS: I next offer in evidence proof of labor on the Gem mining claim, filed 31st day of December, 1897, recorded in Book 1, of record of proof of labor, page 395.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 27.

Mr. DAVIS: I offer in evidence proof of labor for the year 114 1898, on the Morning Star mining claim, filed by the American Turquoise Company, through J. P. McNulty, agent, on the 2nd day of January, 1899, recorded in Book 1, of the record of proof of labor, page 440.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 28.

Mr. DAVIS: Next offer proof of labor for the year 1898, of the Sky Blue mining claim filed by the American Turquoise Company, through J. P. McNulty, agent, on the 2nd day of January, 1899, and recorded in Book 1, records of proof of labor, page 439.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 29.

Mr. DAVIS: I next offer in evidence, proof of labor for the year 1898, of the Old Castillian mining claim, filed by the American Turquoise Company, through J. P. McNulty, agent, recorded in Book 1, record of proof of labor, page 441, Santa Fe county, on the 2nd day of January, 1899.

Objected to by counsel for plaintiff for same reason.

Overruled. Exception reserved.

Marked Exhibit No. 30.

Mr. DAVIS: I offer in evidence proof of labor, for the year 1898, on the Muniz mining claim, filed by the American Turquoise Company, through J. P. McNulty, agent, on the 2nd day of January, 1899, recorded in Book 1, records of proof of labor, page 441.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 31.

Mr. DAVIS: I next offer in evidence, proof of labor for the year 1898 on the Gem mining claim, filed by the American Turquoise Company, through J. P. McNulty, agent, 2nd day of January, 1899, and recorded in Book 1, of records of proof of labor, page 442.

Objected to for same reasons by plaintiff.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 32.

Mr. DAVIS: I offer in evidence proof of labor for the year 1899 of the Old Castillian mining claim, filed by the American Turquoise Company, through J. P. McNulty, agent, recorded in Book 1, 115 records of proof of labor, page 491, on the 4th day of January, 1900.

Objected to for the same reason by plaintiff's counsel.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 33.

Mr. DAVIS: I offer in evidence proof of labor for the year 1899, on the Sky Blue mining claim, filed by the American Turquoise Company through J. P. McNulty, agent, on the 4th day of June, 1900, and recorded in Book 1, records of proof of labor, page —.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 34.

Mr. DAVIS: Next proof of labor for the year 1899, on the Morning Star mining claim, filed by the American Turquoise Company through J. P. McNulty, agent, recorded January 4, 1900, Book 1, page 493, records of proof of labor.

Objected to for same reasons by counsel for plaintiff.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 35.

Mr. DAVIS: Next proof of labor for the year 1899, on the Gem mining claim, filed by the American Turquoise Company, dated January 4th, 1900, recorded in Book 1, page 493.

Objected to for same reasons by counsel for plaintiff.

Overruled. Exception.

Marked Defendant's Exhibit No. 36.

Mr. DAVIS: Next proof of labor for the year 1899 on the Muniz mining claim, filed by the American Turquoise Company by J. P. McNulty, agent, recorded in Book 1, page 465.

Objected to for the same reason by plaintiff.

Overruled. Exception.

Marked Defendant's Exhibit No. 37.

Mr. DAVIS: Next I offer in evidence, proof of labor for the year 1900 on the Gem mining claim, filed by the American Turquoise Company on the 21st day of December, 1900, recorded in Book 1, records of proof of labor, page 514.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 38.

Mr. DAVIS: Next offer in evidence proof of labor for the year 1902, on the Morning Star mining claim, filed by the American Turquoise Company, through J. P. McNulty, its agent, 116 on the 21st day of September, 1900, and recorded in Book 1, records of proof of labor, page 514.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 39.

Mr. DAVIS: Next offer in evidence proof of labor for the year 1900 on the Muniz mining claim, filed by the American Turquoise Company through J. P. McNulty, agent, and recorded in Book 1, of proof of labor, page 515, on the 21st day of September, 1900.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception.

Marked Defendant's Exhibit No. 40.

Mr. DAVIS: I next offer proof of labor for the year 1900, on the Old Castillian mining claim, as filed by the American Turquoise Company through J. P. McNulty, agent, on the 21st day of September, 1900. Recorded.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 41.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1900, on the Sky Blue mining claim, filed by the American Tur-

quoise Company through J. P. McNulty, agent, on the 21st day of September, 1900. Recorded.

Objected to by plaintiff's counsel for same reasons.

Objection overruled. Exception.

Marked Defendant's Exhibit No. 42.

Mr. DAVIS: Offer in evidence proof of labor for the year 1901, on the Muniz mining claim, filed by the American Turquoise Company through J. P. McNulty, agent, on the — day of — and recorded in Book 1, proof of labor, page 586.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 43.

Mr. DAVIS: I next introduce proof of labor for the year 1901 of the Old Castillian mining claim.

Objected to by plaintiff for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 44.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1901 on the Morning Star mining claim.

117 Objected to for same reasons by plaintiff.

Overruled. Exception.

Marked Defendant's Exhibit No. 45.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1901 on the Gem mining claim, duly recorded.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception.

Marked Defendant's Exhibit No. 46.

Mr. DAVIS: I next offer in evidence proof of labor on the Sky Blue mining claim for the year 1901, duly recorded.

Objected to for same reasons by plaintiff's counsel.

Overruled. Exception.

Marked Defendant's Exhibit No. 47.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1902 on the Sky Blue mining claim. Duly recorded.

Objected to by plaintiff's counsel for same reasons.

Objection overruled. Exception.

Marked Defendant's Exhibit No. 48.

Mr. DAVIS: I next offer in evidence proof of labor on the Gem mining claim for the year 1902, duly recorded.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 49.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1902 on the Muniz mining claim, duly recorded.

Objected to by plaintiff's counsel for reasons before stated.

Overruled. Exception.

Marked Defendant's Exhibit No. 50.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1902 on the Old Castillian mining claim. Duly recorded.

Objected to by plaintiff's counsel for same reasons.

Overruled. Exception.

Marked Defendant's Exhibit No. 51.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1902 on the Morning Star mining claim. Duly recorded.

Objected to by plaintiff's counsel for reasons before stated.

Overruled. Exception.

Marked Defendant's Exhibit No. 52.

Mr. DAVIS: I next offer in evidence proof of labor for the year 1903 on the Muniz mining claim, duly recorded.

Objected to by plaintiff's counsel for the reasons heretofore set out.

118 Mr. CLANCY: In addition to the other objections, I make the objection that this proof was made and filed long after the beginning of the suit and would therefore be inadmissible as to anything that could possibly be in issue in this suit, and I make the same objection to any of the others filed after the beginning of the suit.

The COURT: I will let this in for the purpose of proving the labor was done at the time of the filing of this suit, for the period covering and including the year 1903.

Exception reserved by Mr. Clancy.

Marked Exhibit No. 53.

Mr. DAVIS: I now offer in evidence proof of labor of the Sky Blue mining claim for the year 1903, filed by the American Turquoise Company, through J. P. McNulty, agent, December 30th, 1903, and recorded in record of proof of labor, Santa Fe county, page 83.

Mr. REYNOLDS: We desire to show ownership or possession of these properties up to the date of the filing of this suit. The suit was filed in May, 1903.

The COURT: I have admitted it up to that date.

Same objection made by plaintiff's counsel.

Overruled. Exception.

Marked Defendant's Exhibit No. 54.

Mr. DAVIS: I offer in evidence proof of labor on the Morning Star mine for the year 1903, by the American Turquoise Company, by J. P. McNulty, its agent, filed the 30th day of December, 1903, and recorded in Book 2, record of proof of labor, Santa Fe county, at page 82.

Objected to by plaintiff's counsel for the reasons heretofore stated.

Overruled. Exception reserved.

Marked Defendant's Exhibit No. 55.

Mr. DAVIS: I offer in evidence proof of labor of the Old Castillian mine for the year 1903, by the American Turquoise Company by J. P. McNulty, agent, filed on the 30th day of December, 1903, and recorded in Book 2, proof of labor, page 84.

Objected to by plaintiff's counsel for the reasons heretofore stated.

Objection overruled. Exception reserved.

Marked Defendant's Exhibit No. 56.

119 Mr. DAVIS: I offer in evidence, proof of labor on the Gem mine, for the year 1903, by the American Turquoise Company, through J. P. McNulty, agent, recorded in Book 2, page 85.

Objected to for same reasons by plaintiff's counsel.
Objection overruled. Exception reserved.
Marked Defendant's Exhibit No. 57.

Owing to the fact that Judge Mills had to attend a session of the Supreme Court, it being 12:30 p. m., Wednesday, Aug. 30th, an adjournment was taken until Thursday, Aug. 31, 1905, at 2 o'clock p. m.

THURSDAY, Aug. 31, 2 p. m., 1905.

Mr. CLANCY: I desire to call Your Honor's attention to an objection that was not definitely passed upon, and that is as to the papers coming from the custody of the Territorial Librarian.

The COURT: I think I will admit them.

To which ruling counsel for the defendant excepts.

See Plaintiff's Exhibit E.

MAJOR FRITZ MULLER, SWORN.

Direct examination by Mr. M. G. REYNOLDS:

Q. What is your official position?

A. Receiver of the United States land office, at Santa Fe, New Mexico.

Q. Are you custodian of the records?

Mr. CLANCY: That has been proven already.

Mr. REYNOLDS:

Q. Can you produce the plats of Townships 14, 15, 16 north, Range 8 east?

A. Yes; I have them here.

Q. Will you look at the plat showing the survey of the government of Township 15 north, Range 8 east, and state whether or not that is one of the official plats on file in your office?

A. Yes, sir; that is an official plat which is recognized in the office and approved by the department.

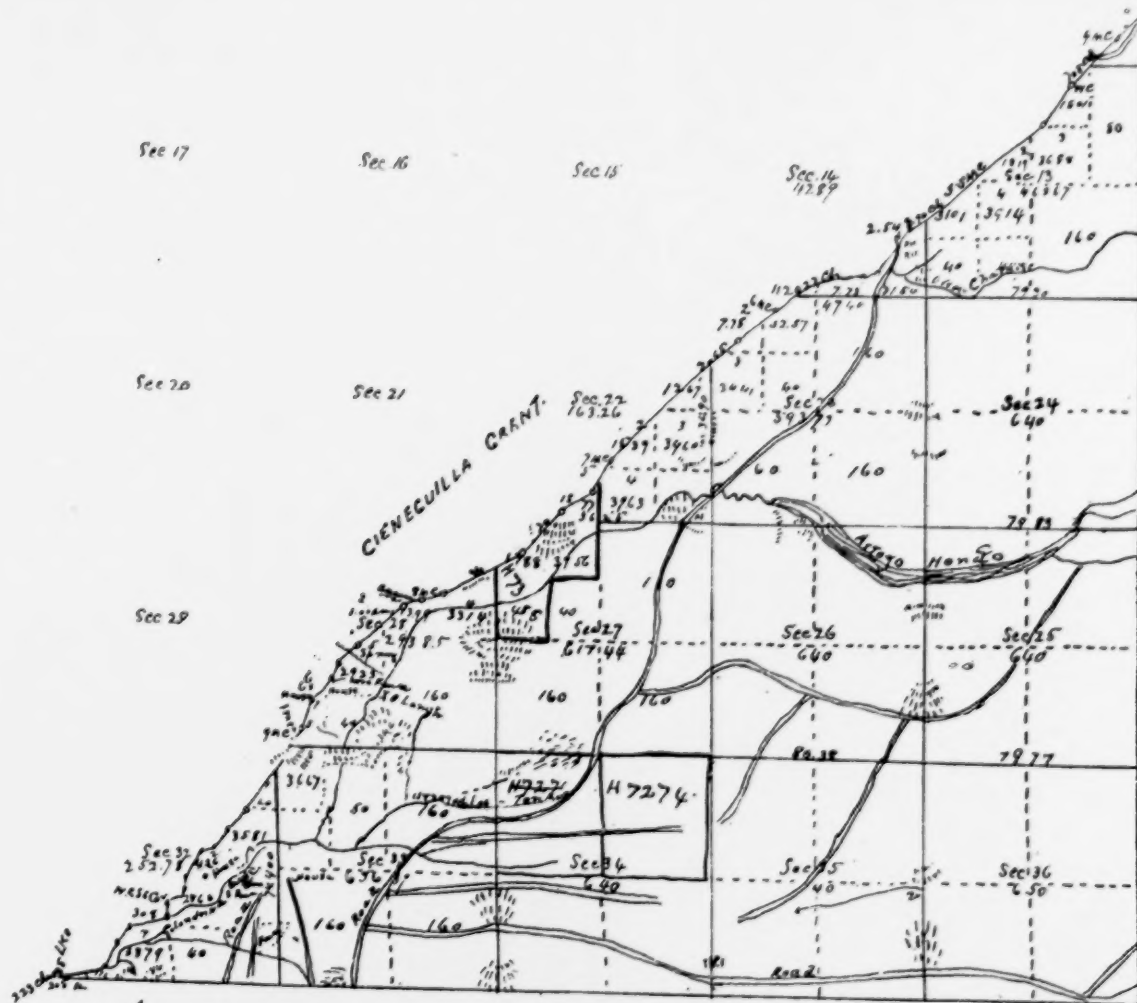
Mr. REYNOLDS: I now offer the plat for Township 15 north, Range 8 east, of the principal meridian of New Mexico, in evidence, together with the official endorsement thereon, with a view
126 of showing the time when the surveys were extended over it and the time when it was filed in the office of the Register and Receiver for the purpose of location.

Marked Defendant's Exhibit No. 58.

Mr. CLANCY: The pleadings show that and it is admitted. It unnecessarily incumbers the record with a plat.

Mr. REYNOLDS: I will file a plat, if necessary.

Mr. REYNOLDS: I now offer in evidence the official plat of fractional Township No. 16 north, Range 8 east, of the New Mexico principal meridian, and do that for the purpose of showing the location, as far as they go, of claims in that section, and explain to



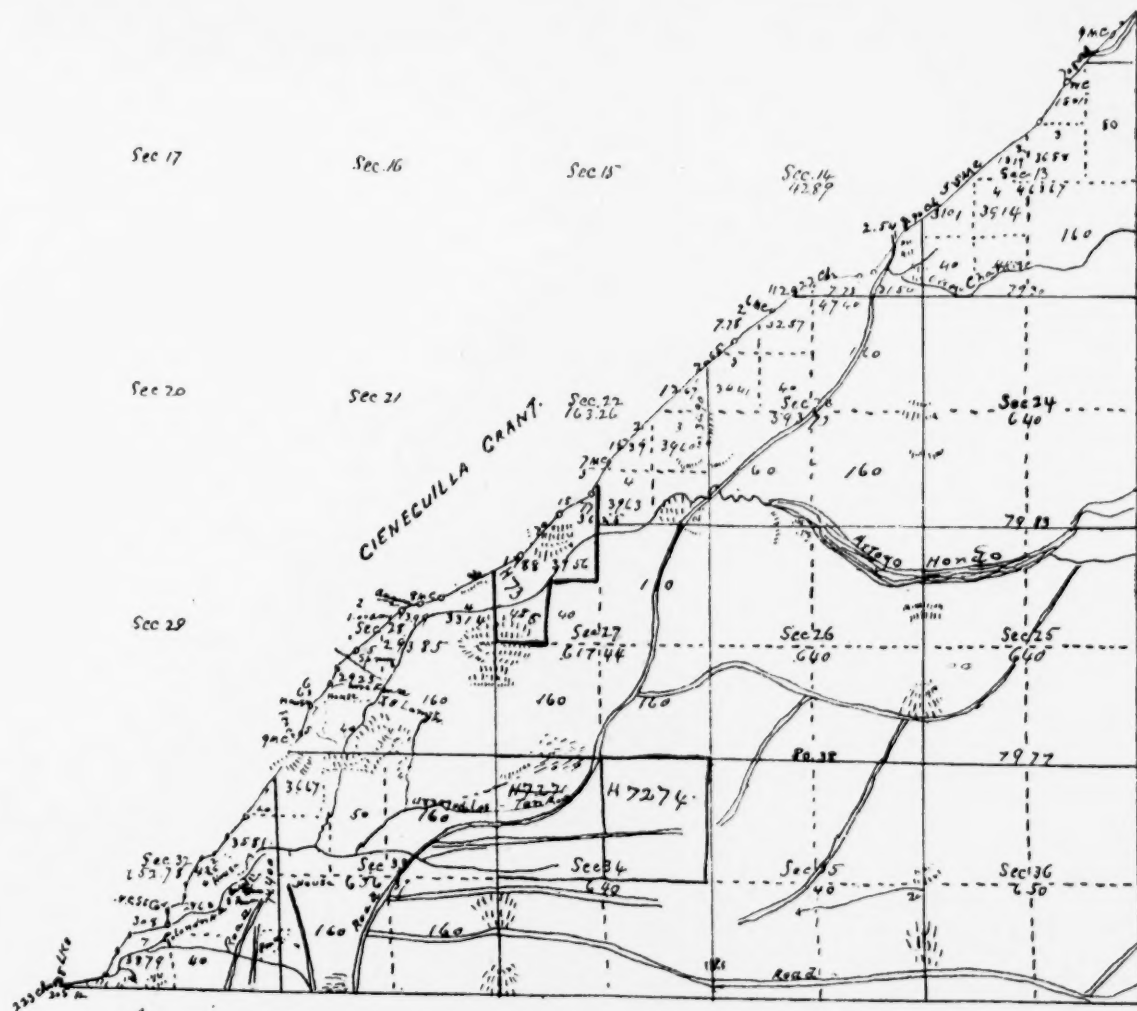
This is to certify that the above plat is a true and correct copy of the official plat of Trac. Township No. 16 North Range No. 8 East of the New Mexico Principal Meridian on file in this office.

Santa Fe, N.M.
Aug. 22, 1906.

Hammel R. Otto

Register.

No. 43 }
Sera } p. 122
Dugovic }



This is to certify that the above plat is a true and correct copy of the official plat of Trac. Township No. 16 North Range No. 8 East of the new Mexico Principal Meridian on file in this office.

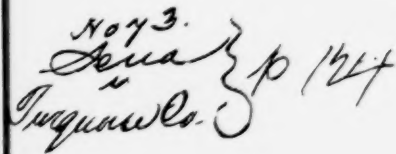
Santa Fe, N.M.
Aug. 22, 1906.

Mamuel R. Peto

Registrar.

No. 43
Sera
w
Purquoise Co

Recd with Y's letter of Apr. 29th 1851



Grand summary of Cases 1741-1855				
Large designated	By whom changed	Date of Contract	Amount of Change	When changed
Substitution of Meanders	A P. Walker do do	March 3d 1855 do do	Main claims \$46 39 65 65 8 74. 61	April 1855 do do

Received with Surveyor General's letter 2628/39 of April 29th. 1853

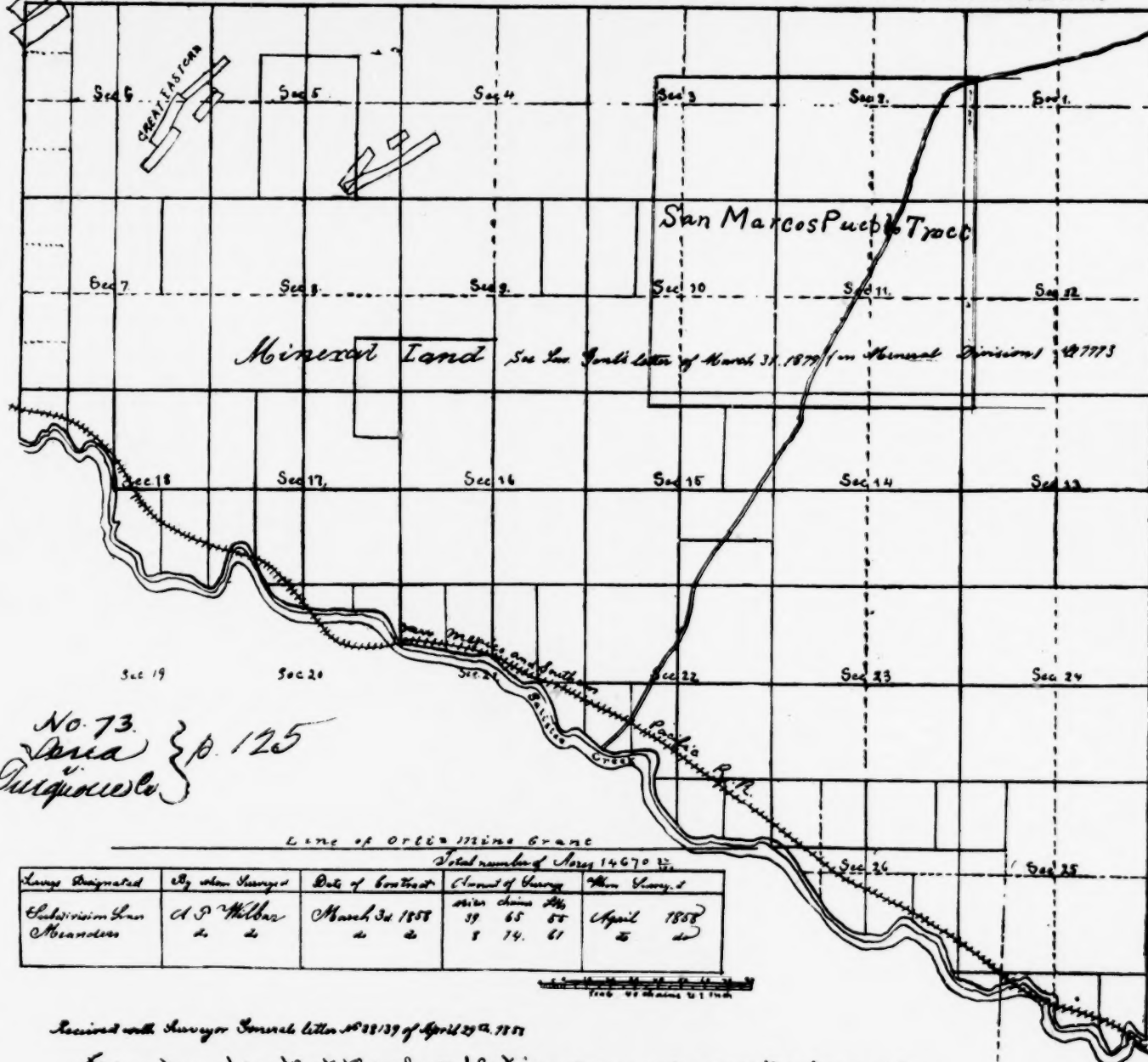
This is to certify that the above plat is a true and correct copy of the official plat of Twp. Township 12 N. Range No 8 E of the principal meridian, N.M. on file in this office.

Santa Fe, N.M.
May 22, 1906

Mammal R. Otter
Register

Survey with U.S. letter of April 24th 1858

FRACTIONAL TOWNSHIP N°14 N. RANGE N°8 E OF PRINCIPAL MERIDIAN



No. 73
Area } p. 125
Turquoise

Line of Orleans & Indiana Grant				
Total number of Acres 14670 1/2				
Acres Designated	By whom Surveyed	Date of Survey	Amount of Survey	When Surveyed
Subdivision San Joaquin	A. P. Wilson	March 31, 1858	39 65 55	April 1858
Meandered	do do	do do	8 14 61	do do

Received with Surveyor General letter No 22/39 of April 29th 1858

This is to certify that the above plat is a true and correct copy of the official plat of Township No 14 N. Range No 8 E of the principal meridian, N.W. on file in this office.

Santa Fe, N.M.

Aug. 22, 1866.

Mamuel R. Herg
Register.

the court that the Cieneguilla grant which appears on that plat to the northeast of it, is not extended over it, because it is a private land claim.

Marked Defendant's Exhibit No. 59.

Mr. CLANCY: I think we desire to further object to this plat of Township 15 north, Range 8 east, for the reason that it does not correctly show the survey of the Cerrillos grant, except with an additional pencil line inside of the original survey.

Mr. REYNOLDS: I am not offering it to show anything about the present location or condition of the Cerrillos grant. It is offered for the purpose of showing the location of all claims that were known, and the manner in which they were asserted in the office of the surveyor general and government of the United States under the act of 1854—regulations promulgated by the secretary of the interior.

Mr. REYNOLDS: I also offer in evidence plat of fractional Township No. 14 north, Range 8 east, showing the northern part of that township, immediately south of Township 15 north in the same range.

Marked Defendant's Exhibit No. 60.

Mr. REYNOLDS: Now I desire to locate the records of the homestead entries.

Mr. CLANCY: Give us the names of the claimants and the map and we will admit the location of the homestead entries. We will agree to that.

Mr. REYNOLDS to Witness MULLER: I wish you would send down all the homestead locations, to show the dates of the location of the property down there, that falls within the claimed out-boundaries.

(Here follow maps marked pp. 120, 121, 122, 123, 124 & 125.)

127 EDWARD F. BENNETT, SWORN.

Direct examination by Mr. M. G. REYNOLDS:

Q. State your full name?

A. Edward F. Bennett.

Q. Where do you reside?

A. Cerrillos.

Q. How old are you?

A. Sixty-two.

Q. How long have you been in New Mexico?

A. The past 26 years.

Q. What has been your business?

A. Prospecting and mining.

Q. Is that your business now?

A. Yes, sir, mainly.

Q. Are you acquainted with the country down in what is known as the Cerrillos Mining District, and particularly in and around what is called the Turquoise mines?

A. Yes, sir.

Q. How long have you known that country?

A. Twenty-six years.

Q. Have you had occasion to go over it much?

A. As a prospector, yes.

Q. Are you familiar with the topography of it?

A. Yes, somewhat.

Q. State whether or not you have prospected practically all over it?

A. Yes, nearly all over the district.

Q. Do you know where what is called the Cerro Pelado, or Turquoise Peak is situated?

A. I know where the peak is located. I am not acquainted with the Mexican names.

Q. Do you speak Spanish?

A. Very little.

Q. Read and write it?

A. No, sir.

Q. Speak Spanish well enough to get along with the people in that country?

A. I have for a good many years; yes, sir.

Q. I will get you to state whether or not in the course of your prospecting over that country, you ever located or worked upon any of those mines, situate in and around the present location of the Turquoise mines or property in suit here?

A. Yes, sir.

128 Q. When?

Mr. CLANCY: I reserve the right to strike out without making objections as we go along, because I do not think it is material or competent evidence.

A. I think the first of my work was sometime about 1886 in the claim adjoining the Castillian, named then, the Judge Scribner. I

worked later in the Muniz mine, and that is all I worked in that district. Further south in the district there are more turquoise properties, that I worked in.

Q. In the course of your prospecting did you ever locate any mines of your own or attempt to locate any property?

A. Yes, sir.

Q. What did you do with reference to determining the question of whether or not the property was open for location and whether or not there was any claims asserted to property so as to prevent the proper location of mining claims?

A. When I first went into the district, I heard there were some patented lands down there, and some of public domain, so I got plats or tracings from the plats made in the surveyor general's office, and perhaps in the land office, to keep from interfering with prior rights in my prospecting on the public domain, and that is how I kept clear as much as possible.

Q. Where did you apply and to whom?

A. I went to the surveyor general's office, to the chief clerk, and requested a plat of that part of township Nos. 14 and 15, including the Cerrillos hills, where there were prospects so I would know where there were patented lands, entered lands and grants, and prospects that showed on the public domain.

Q. What year was that?

A. That was in 1879.

Q. Did you get such a plat?

A. Yes, sir.

Q. From whom did you get it?

A. Through David J. Miller, one of his clerks named Wm. Tipton made the plat.

Q. Have you got that plat now?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. (Witness here took large pocket-book from pocket and out of that produced the plat.)

Q. What district or country does that represent?

129 A. It represents Townships 14 and 15 north, including the Cerrillos Hills, where I proposed to prospect.

Mr. CLANCY: We object—the plat speaks for itself.

Mr. REYNOLDS: Do you know a spring in the country called the Coyote Spring?

A. Yes, sir.

Q. Do you know within what section it is located?

A. I cannot remember the sections. I have been there.

Q. What is the nature of the country around that spring?

A. Slightly hilly.

Q. Describe the appearance of that spring as you saw it, and as you have known it from time to time, and the topography of the country immediately around it?

A. Well there is something like a gulch or arroyo there, and the water gets down to bed rock, which is sandstone, and in some of

the fissures the water seeps out of **them**, and that is what I know by the Coyote Spring. It is frequented by cattle and sheep owners.

Q. Do you know the names with which the locality the arroyo on which it is located is called?

A. Well—below there, there is an outlet into the San Marcos arroyo—it is rather a canyon, a precipitous wall—in places there the water seeps out, and runs down into a little valley—the valley of San Marcos. There used to be water works there for the town of Cerrillos, and there is now I believe.

Q. What is the arroyo called?

A. Coyote Canyon or Coyote arroyo.

Q. Have you been quite familiar with the names of objects in that country from time to time as you have heard them from those who have been there long before?

A. Why, yes, from the Mexicans. There are several arroyos there. I can't remember all of them.

Q. I mean either north or south of this Coyote Spring?

A. Yes, sir.

Q. I will ask you to state whether or not you know or have ever heard in that vicinity from anybody, at any time, of such an arroyo as the Arroyo del Oregano?

A. I never heard of such a one.

Q. Have you ever heard of such an arroyo in and around that spring, east or west or north or south of it—as the Cuesta del Oregano, or the Cuesta of the Arroya del Oregano?

A. I never heard of it.

130 Q. I will ask you to state if in the course of your prospecting in that immediate country, whether or not you were attempting to keep off of the claims, and keep off the boundaries of land grants?

A. That was my purpose, and that is the reason I had the plats made so as not to interfere with any prior rights in my prospecting.

Q. In the course of that time did you ever hear of a grant of land in that country, or in that locality, west and south and north or east, *or east*, south and north of the Cerrillos grant, called the Jose Leyba grant?

A. I never heard of that grant until recently.

Q. How did you happen to hear of it recently?

A. By hearsay—in reading the proceedings of the land court.

Q. Was that after the claim was made by Mr. Sena to this property that you heard it

A. Yes, sir.

Q. Did you make any inquiries at the surveyor general's office at the time you obtained the plat, and also at other times in making your locations or prospecting in that country, as to whether or not it was covered with any other grants than the one you have on this plat?

A. I made no special inquiry. I requested a plat that would show all prior rights there, so I would make no interference whatever with any one's rights in that country. They put down the

Juana Lopez grant, the Cerrillos grant, etc. I had no other tracings made in 1880.

Q. Did you ever work on the Castillian mine?

A. Very little.

Q. When did you first work on it?

A. I think in 1889.

Q. Who was the claimant of it at that time?

A. A man named Parmalee.

Q. How long did you work for him?

A. I did not work for him, I worked for another man who had a lease there taking out turquoise.

Q. Do you know who has been in possession of that property since?

A. J. P. McNulty, superintendent of the American Turquoise Company.

Q. How long has he been there, if you know?

131 A. Since 1892 or 1893, I forget the exact date.

Q. Prior to 1892 do you remember who was in possession of the Castillian mine?

A. Yes, Mr. Parmalee was in possession of that Castillian mine at one time. Prior to that a man named Marshall worked there in the year 1879 and 1880—he worked there cleaning out a lot of waste rock and got down to the old diggings, and afterwards Parmalee came there. I don't know whether he made a location or bought out Marshall.

Q. That is what is known as the Castillian or Parmalee mine?

A. Yes, the old Castillian mine.

Q. That is a part of the group of the American Turquoise Company there now?

A. Yes, sir.

Q. I will ask you to state whether or not you ever worked on or knew anything about, or if you were the owner of the Muniz mine?

A. I located the Muniz mine once myself and abandoned it.

Q. When was that?

A. I think in 1889. I never recorded it. Later it was relocated by myself and John Andrews. Later the Muniz's came and located and worked it.

Q. Do you remember about when they located it?

A. I can't say positively.

Q. Were the Muniz's in possession of it?

A. They were, before the American Turquoise Company.

Q. At the time they located it, were you with them and taking any part in the location?

A. No, sir, I was working close by and saw them.

Q. Did you take any part as a witness in any of the group of mines, either the Castillian, Morning Star, Sky Blue, Gem, or Muniz?

A. I was a witness to the relocation of the Castillian in January, 1885, but it was not recorded. It was located by E. G. Boyce for Parmalee, who lived here in Santa Fe.

Q. Well, was it then relocated?

A. Yes, it was relocated afterwards.

Q. How long has J. P. McNulty been there in charge of that property continuously, to your knowledge?

A. I think since 1893, it might have been 1892.

132 Q. When did you first know Mr. McNulty?

A. I knew McNulty in 1886, but he was not in there then.

Q. Do you know where the land of Tom Whelan in that country is located, in what section?

A. I know the location. I don't know as I can give the section exactly. I had a ranch a little west from there myself.

Q. Do you know whether or not this Coyote Spring as it is called, is on what is now a homestead of anybody down there?

A. I don't know that it is now, but it was on land that was filed on.

Q. Filed on by whom?

Objected to by Mr. Clancy, as not the best evidence and incompetent.

Objection sustained.

Q. Do you know who claims the land aside from Mariano Sena, where the Coyote Spring is located?

A. I don't know who does now. There was a claim made there by Albert Guyer.

Q. Do you know what kind of a claim it was?

A. I think it was a homestead.

Q. Do you know how far the southeast corner of the Cerrillos Grant, as it was understood by you, and the information you obtained from your plat, and on the ground—how far it was from the turquoise mines—the southeast corner?

A. I would think it was about 1-8th of a mile.

Q. Do you know what section that was in?

A. I don't remember. It is possible it would be in Section 21.

Q. In the course of your prospecting in that country did you ever hear of and did you ever make or did anybody produce to you, or did you ever hear of it in any way, the claim of a grant to Jose Leyba, or any other Leyba, to the land lying east and south, and within now Sections 21, 28, 29, 30, 31, 32, 33 and 34?

A. No, sir.

Q. Were you over that country?

A. Yes, sir. I think so.

The Court:

Q. Was there any ruins at that Coyote Springs of any house?

A. No, sir. I never saw any.

Mr. REYNOLDS:

Q. How often were you around those springs?

133 A. Not very often, for it is outside of where I was prospecting.

Q. Are there any ruins of any corrals or houses, and if so, what do you know about that?

A. There was a kind of a dug-out made there in the side of the bank in the clay, and I helped to put up a cabin for the Guyer's ranch. I did not see any ruins. I did not go over the tract though.

Q. In those years, at the Coyote Springs, did you see any ruins of an adobe house or wall, three and a half to five feet high?

A. No, sir.

Q. Is there any such thing around there now?

A. Nothing, except those of San Marcos, a mile below there.

Q. San Marcos is in Township 14, is it not?

A. Yes, sir.

Q. How long do you say you have been in and around the Coyote Spring?

A. Ever since 1886, but most of my prospecting is further west in the hills, so I am not frequently there, but I have been there several times.

Q. Are there or are there not in and around Coyote Springs any evidence of ancient habitations, such as houses?

A. I did not see any.

Q. Do you know J. M. Allen?

A. Yes, I was slightly acquainted with him.

Q. Do you know whether or not he was in that community and whether or not he located what is now called the Morning Star mine?

A. I don't know about that location.

Q. Did you know C. G. Storey?

A. Yes, sir.

Q. Did you see him there

A. Yes, sir.

Q. Do you know whether he was in possession of any of that property or not?

A. Yes, sir. The Muniz and the Castillian.

Q. Do you know whether he located any of it or not?

A. I could not say as to that.

Q. When did you see him in possession of the property down there?

A. In 1888 and 1889, to 1893, I think.

134 Q. Was he in possession when McNulty came there?

A. Yes, I think he was.

Q. Do you know anything about the Muniz's? About Pedro and Faustin Muniz being there?

A. Yes, I knew of them being there. I was not well acquainted with them though.

Q. Well, you are well acquainted with them now are you not—with Pedro?

A. Yes, and there is an old gentleman—the father of them, who is dead. I knew him.

Q. Give me the names of the people, as you remember them, who were in possession of that property, these mines—the Gem, Morning Star, Sky Blue, Castillian and Muniz—prior to the time McNulty came there and took possession of them.

A. C. G. Storey was the next before McNulty, and he told me that——

Objected to by Mr. Clancy.
Sustained.

Q. Do you know who was in possession of the property, or any one of them, separately or together, before Storey?

A. Yes, sir the Parmalees were in possession of the Castillian and the ground where the Muniz is there was a man named Callander there in the early eighties.

Q. Who came there after Callander?

A. There was Marshall who had the Castillian first before Parmalee.

Q. What I am after is to get you to state to the court, if you can, who was in possession of any one of these pieces of property covering all five of them, if you know, running back from Storey, as far back as you know, independent of how they claimed them, or what they were doing?

A. Well these were separate claimants I spoke of and they were prior to Storey.

Q. Do you know how long that property in that vicinity had been worked for turquoise before these locations were made in the years 1890, 1891 and 1892?

A. Some of the first locations were made I think in the winter of 1880.

Q. Was that property down in that country known as or understood to be valuable for turquoise?

A. Not until some time later.

134½ Q. Was it being prospected for it or for any other mineral that you might have found, very actively?

A. There was other minerals prospected for close by the turquoise mines.

Q. Do you know whether or not J. P. McNulty since he has been in charge of that property—what kind of possession has he had? Has anybody else been there?

A. Why—it is my understanding he is superintendent for the American Turquoise Company.

Q. From the time he first came there, has there anybody else ever been in possession of that property that you know of?

A. No, sir.

Q. And that was in 1892 or 1893 you say?

A. Yes, sir, in 1892 or 1893.

Cross-examination by Mr. F. W. CLANCY:

Q. Do you know an arroyo out there called the Arroyo de la Piedra? Did you ever hear of an arroyo of that name?

A. I can't remember it.

Q. Did you ever hear of an arroyo in that vicinity called the Arroyo de las Gallinas?

A. Yes, sir.

Q. Where is that situated with reference to this Coyote Spring?

A. I think it is a little west of it.

Q. That is it is a little farther down the Cienega in which the spring is situated, and joins that arroyo does it not? The Arroyo de las Gallinas comes down and connects with the arroyo in which the spring is?

A. This arroyo you speak of comes out on the plains, flowing westward and south, I don't remember whether it joins any other arroyo, but it probably flows into the San Marcos arroyo.

Q. Well now, did you ever hear that where that arroyo and the one in which the Coyote Spring is situated, that from the place where they join down, it was called the Arroyo de la Piedra?

A. I can't remember that.

Q. Now at the place where the spring is in the arroyo on the right hand side coming down the arroyo, there is quite a little hill just opposite the spring?

A. Yes, there is a slight hill—rising ground.

Q. A matter of 20 or 25 feet above the arroyo?

135 A. Yes, there is, on both sides.

Q. Now on the right hand side it rises rather abruptly for a short distance, and then comes back pretty near level?

A. I think there are gulches like and a gradual rise onto the plains coming down from the northwest.

Q. On that eminence or hill, on that side, did you ever make any examination there to see whether there were any indications of former houses there?

A. There is a trail coming along in there perhaps 200 feet from the spring. I put up a cabin there. I don't remember seeing any ruins there.

Q. You never made any search for them?

A. Not specially; no, sir.

Q. Now, on the other side of the arroyo, towards the San Marcos, the ground rises gradually for quite a long distance, two or three hundred yards, and perhaps more?

A. Yes.

Q. A sort of a slope?

A. Yes, sir; towards the arroyo.

Q. And here and there a little arroyo coming down into the larger arroyo, but there is a gentle rise towards the southward, towards San Marcos?

A. Yes, sir.

Q. And the Arroyo de las Gallinas comes down, does it not, from that Cañada or valley in which there are several locations, including that — Tom Whelen and others?

A. Yes, that is my understanding.

Q. Don't they call that the Cañada de las Gallinas, and further down the arroyo begins, continuing on, as the arroyo de las Gallinas—is that right?

A. I never heard the name applied below where the ranches are on the prairie. I have crossed the arroyo backwards and forwards. I have been down there, but the names given by the Mexicans down there I don't understand as well as I do up in the district proper,

for I have done more prospecting in the rocks. I had a ranch down there.

Q. You never paid much attention to the names down there?

A. No, sir.

Q. Did you ever hear of a grant out there called the Sitio de los Cerrillos, in that region?

A. No. I have heard of the Los Cerrillos grant.

136 Q. You never heard of the one adjoining they call the Sitio Los Cerrillos?

A. No, sir.

Q. Ever hear of one called the Sitio de Juana Lopez?

A. I have heard of the Juana Lopez grant.

Q. Is that the one they call the Mesita Juana Lopez?

A. Yes, sir.

Q. I mean another one, much smaller, known as the Sitio de Juana Lopez—did you ever hear of that?

A. I think I have heard of it.

Q. You have heard of it recently, haven't you?

A. Several years ago.

Q. Whereabouts is that situated?

A. Well, I never knew exactly, but I supposed it would take in a part of the tract down to what is known as Pino Ranch, and adjoining the main Juana Lopez grant, but it did not come up in the district, and so I paid no attention to it.

Q. Did you ever hear anything about that until after the land court?

A. I can't remember the time I heard of it first exactly.

Q. It is 14 years since the land court was created.

A. I heard of it first through prospectors, who said it came up close to the mining district, but I could not ascertain that it interfered with the claims in the hills, and so I did not pay much attention.

Q. I understand you that down below the Coyote Spring, where the water came out in the canyon, that that was called Coyote Canyon?

A. I understood it to be called that by the people who lived there in the San Marcos arroyo.

Q. Who ever told you of the Mexicans, that that was the name of it. Can you remember?

A. I think Diego Mares was one, and some others who lived in Poverty Hollow—the name of the mining camp there.

JAMES PATRICK McNULTY, SWORN.

Direct examination by Mr. M. G. REYNOLDS:

— State your full name to the court and jury?

A. James Patrick McNulty.

Q. How old are you?

A. Fifty-six years old.

Q. Where do you reside?

137 A. At the Turquoise mines.

The COURT:

Q. Are those the mines in this suit?

A. Yes, sir. The American Turquoise Co. mines. I went there on the 2nd day of March, 1892, and took charge of the working of the property from that time until the present time.

Mr. REYNOLDS:

Q. I will ask you to state whether you have been since that time in the exclusive possession of the property representing various people?

Objected to by Mr. Clancy.

Question withdrawn by Mr. Reynolds.

Q. Who did you represent when you first went there?

A. I went to work for a man named C. G. Storey. He was then east.

Q. Now, go on, and state in your own way all that you have done there, for whom you have done it, and at what time you have done it, and how you have been there from the time you say you went there to the present time?

A. I have done the assessment work on all the claims.

Q. What claims are they?

A. For the Castillian, the Muniz, the Morning Star, the Sky Blue and the Gem claims, for each and every year, excepting one year which was exempt from doing assessment work, and I done the assessment work that year on the Muniz—that was either in 1893 or 1894.

Q. Go on and state all about what you have done — what is there—what you have constructed and all about it, give to the court a full and accurate history of what you have done, and for whom you have done it, and how you are there?

A. I worked for Messrs. Allen and Storey and for Andrews and Doty. I have written to them and they have written to me. I have letters to show for it. Also to the Farmers Loan and Trust Company—I have shipped them—and also to a man by the name of Arling, in New York.

Q. Go on and state whom you first represented when you went there in 1892?

A. Allen and Storey.

Q. Then whom did you represent?

A. Andrews and Doty.

Q. Who are they?

A. They were a company that Mr. Storey wrote me had charge of the property for the sale of stones, etc.

Q. Who else did you represent after Andrews and Doty?

138 A. Doty was the man I shipped the turquoise to—

Q. I am talking about the ownership of the mines?

A. They were the American Turquoise Company—that is the company they represented.

Q. In what capacity did you represent the first American Turquoise Company, if there were two?

A. I always shipped to the American Turquoise Company.

Q. We are talking about whom you represented, Mr. McNulty—if you were there at all, who were you working for?

A. The American Turquoise Company from that time until then after Storey sold out to the American Turquoise Company.

Q. Do you know whether or not there was more than one American Turquoise Company?

A. I don't know. It was always The American Turquoise Company to me.

Q. Do you remember whether or not there was a suit to foreclose the mortgage on the mines? Do you remember anything about that?

A. Yes, sir, I do—because I have got letters to show it, stating when it was transferred from one to the other.

Q. Since that transfer, whom have you represented there?

A. The American Turquoise Company. Mr. R. A. Parker, No. 52 Wall St., New York.

Q. What has been done there. What improvements if any have been made upon the property while you were there?

A. In the workings of the mines there is quite a lot of improvements.

Q. Outside of the surface ground?

A. There is a large three-room house, and I have got a whim on the Muniz mine.

Q. What about the payment of taxes, if anything?

A. That the attorney has attended to.

Q. Have you got any tax receipts?

A. The receipts are all sent to New York. All the receipts I got here or any other place are sent to New York.

Q. What if any work besides the assessment work *have* been done on these mines?

A. Oh, there has been thousands and thousands of dollars' worth of work done.

Q. Under whose direction and supervision was that work done?

139 A. Under mine, sir.

Q. And for whom—who did you represent?

A. The American Turquoise Company.

The COURT:

Q. Do you know what township and section these claims are in?

Mr. CLANCY: That is agreed in the pleadings.

Mr. REYNOLDS: It is admitted these mines are in Section 21, Township 15 north, of Range — east. That is the admission.

Q. Are these mines located one with the other?

A. There is three of them running parallel, and one at the end, and then the Castillian. There is something like 200 feet between the Castillian and the group.

Q. Where is the house located with reference to the group?

A. There is one house I built on the Gem claim. The Muniz

house I first lived in on the Muniz claim, an old house that the Muniz had there. I lived in it several years.

Q. Was there any other house on any of the other claims?

A. Not on the American Turquoise Company's claims.

Q. How long have you lived in these houses?

A. Since the 2nd day of March, 1892.

Q. What were you doing there?

A. I was in charge of the property there for the American Turquoise Company.

Q. Has there been anybody else there in charge of the properties except yourself?

A. Not that I know of, unless when Doty and Storey came out, they might have been ahead of me you know, but they left it all to me, but of course I put them down as being over me, but I was in charge of the property.

Q. You have been continuously in charge since you have been there?

A. Yes, sir—of all the workings.

Q. When, if at all, did you first hear of the claim of Mariano Sena?

A. In either 1895 or 1896, I don't remember which year.

Q. How did you happen to hear of it?—state the circumstances.

A. By the Sena party coming out there, and this man Vroom and Purdy and some other attorney, I did not know, and Mariano Sena, and after they left there I heard of their having a claim of a grant being in there, but I did not know anything of it before; but

140 they seemed to go around on the dump of the mine. I let nobody around there. I had been out hunting that day and when I came back I saw them there and I ordered them down from there, and after that I heard that they had a claim on there, not a claim of the mines, but I heard they had a claim on the grant.

Q. Do you know where Coyote Spring is located?

A. No.

Q. Have you ever been down to it?

A. Not that I know of.

Q. What improvements were there when you went there in 1892, and on what claim were they?

A. There were no improvements, only that old cabin they claimed they bought from the Muniz's, on the surface—no other improvements only a windlass.

Q. That was the first place you occupied?

A. Yes, in that house they claimed they bought from Muniz.

Q. I will get you to state, since you have been there, how you have exercised and performed your duties in behalf of those you represented when you were in charge of the property?

A. I have always had orders from New York, when to put on a force of men and when to let them off.

Q. I am speaking with reference to other people than you put there yourself for working purpose—the general public.

A. I don't understand you right.

Q. Well, I will put the question directly. Have you kept the general public off that property or not?

A. Did I keep them off?

Q. Yes, each and every man.

A. Yes, each and everybody I kept off, unless they would be an acquaintance of mine, and then I used to walk about with them so they could not pick up anything and take it away.

Q. How long has that continued?

A. For about 12 years.

Q. Fix the first date.

A. I kept them off from the first part of the year 1894.

Q. Has there been anybody exercised any acts of ownership over this property since you have been there in 1892, other than yourself?

A. No, sir. Of course the Indians came there, and claimed the property belonged to them you know, and tried to put me off, but they did not do it. They came well armed, too. One of them said he was Chief. They were from San Felipe, and they said the land belonged to them long before the Spaniards came, and they wanted me to go away. This Indian was the only one—nobody ever came there that I know of.

Q. When did you build that new house on the Gem?

A. In 1891 to the best of my knowledge. No, I mean in 1901.

Q. Now, as a matter of fact Mr. McNulty, you have been in possession there. State to the court the names of the claims you have been in possession of there.

Mr. CLANCY: He has named them before.

The COURT: He named the Castillian, the Sky Blue, the Morning Star, the Gem, and the Muniz.

Cross-examination by Mr. F. W. CLANCY:

Q. Who paid you for your services?

A. The American Turquoise Company.

Q. Now, some individual must have done it—who did it?

A. It came through the mail. J. M. Allen was treasurer for awhile, and Storey sent me money through the mail and by express.

Q. Did you ever receive any pay from Andrews and Doty?

A. Yes, sir.

Q. They paid you, did they?

A. They sent it through the mail.

Q. It was from them you received your compensation?

A. Yes, sir.

Q. Ever receive it from the Farmers' Loan & Trust Company?

A. I did.

Q. And did you receive a payment from that man in New York, Mr. Alling?

A. Not to my knowledge, because Mr. Doty was in charge then and sent the money.

Q. Now, you say that there was a great deal of money spent on the property outside of the assessment work?

A. Yes, sir.

Q. How much was the value of that work?

A. I really cannot tell, considerable though—thousands of dollars.

142 Q. Do you think you have done ten thousand dollars' worth of work there?

A. I have.

Q. That is about as much as you have done?

A. More.

Q. How much more?

A. I cannot state now until I look over the records. I have done more.

Q. You don't know how much more?

A. No, sir.

Q. Do you think as much as fifteen thousand dollars' worth of work has been done there by you?

A. Yes, sir.

Q. More than that?

A. Yes, sir.

Q. You know what I want—you can save time by answering me and tell me to the best of your knowledge how much it is.

A. To the best of my knowledge there is over twenty-five thousand dollars' worth of work done on one mine.

Q. Which mine is that?

A. The Muniz.

Q. How much was done on the other mines?

A. I have done assessment work on the others, \$100 each and every year, except one year.

Q. That is one hundred dollars' worth of work on each of the other mines?

A. Yes, sir.

Q. Now what has been the value of the output of the property?

A. That I know not. I ship stone—when I take them out, but I don't know what they get for them in New York.

Q. You don't know anything about the value of the stones you take out?

A. No, sir; I have not sold any.

Q. I did not ask you whether you had sold any.

A. Then I do not know the value.

Q. With all your years of experience there, you have no idea of the value of a piece of turquoise?

A. I have not, only by hearsay, that is all.

Q. Well, you have from what you have heard from other people—you have learned what the value of turquoise is?

143 A. Some say they buy for 25 cents a carat, some say \$5.00 per carat, but I don't know what my company gets for them.

Q. I don't care what your company gets for them. I want to know what the value of the output is, when it comes out of the ground.

A. I don't know about that. I ship the stones in the rough and I could not tell you what they are worth.

Q. At the time Sena and Purdy were down there, at the time

you spoke of—didn't you tell Mr. Purdy that you were getting two hundred thousand dollars out of the mine?

A. I did, and I have told others besides, anybody who will ask me—How much did you get out of here, I says, I will not put it under two hundred thousand dollars.

Q. Don't you think now that since the time you went there to work that you have taken out and shipped away about five hundred thousand dollars' worth of stones?

A. That I do not say. I do not know anything about it. I am under oath now.

Q. I am asking your opinion.

A. I cannot say.

Q. You have no opinion at all?

A. Not the moneys' worth; No, sir.

Q. How much in quantity have you shipped from the mine?

A. That I know not.

Q. Never kept any record of it?

A. Never kept a record.

Q. Don't you know how many pounds you shipped at any time?

A. Oh, yes; sometimes three pounds in a cigar box; sometimes six pounds, but it would be rock and turquoise mixed in together.

Q. Did you always ship small quantities?

A. I ship out the rough stone and let them do what they please.

Q. How large a shipment did you make at one time?

A. I do not know.

Q. Did you ever ship a carload?

A. No, sir. Nothing that I was not able to lift myself.

Q. You sorted out what appeared to be the best and shipped it, didn't you?

A. Yes, sir; certainly.

Q. Have you done any turquoise mining on your own account?

144 A. I have. I had men to work, but not myself. I have men working at prospecting, but not getting out turquoise.

Q. Never got out any from your own mine?

A. Not for sale.

Q. Never have sold any at all?

A. No, sir. I have got claims along side of The American Turquoise Company.

MICHAEL O'NIEL, sworn.

Direct examination by Mr. REYNOLDS:

Q. State your name?

A. Michael O'Neil.

Q. How old are you?

A. Fifty-two years old.

Q. Where do you reside?

A. Three miles north of Cerrillos Station.

Q. How long have you been in this country—New Mexico?

A. Since 1878.

Q. In what particular locality have you been most of the time?

A. In this county, in the southern part of this county.

Q. What has been your business?

A. Prospecting and mining.

Q. Was that your business when you came here?

A. Yes, sir.

Q. Are you acquainted with the general lay of the country in and around what is known as the Turquoise mines?

A. Yes, sir.

Q. Do you know the Turquoise mines and the location of them in South Santa Fe county about which Mr. J. P. McNulty has just testified?

A. Yes, sir.

Q. How long have you known that locality down there?

A. Since 1880.

Q. Have you been over that country south of there much?

A. South of the Turquoise mines?

Q. Yes, sir. South and east of them?

A. Yes, sir.

Q. Are you acquainted with a place down there called Coyote Spring?

A. Yes, sir.

Q. How long have you known it?

145 A. Since 1880.

Q. Describe it to the court—the character of it and the character of the country around it.

A. It is the south end of what is known as the "Gallinas Draw"—as we call it. As it goes south, it becomes a canyon, and it is very rocky and the water seeps out all along; it is no regular spring, but the water comes out of the sides of the canyon, and it is about two and a half or three miles in extent, and the ground on each side is quite rocky and in most places quite steep.

Q. I will ask you to state whether or not you have observed the condition of the country near and around it with reference to ruins of houses?

A. About two miles from there at San Marcos there are ruins there, twenty-five or thirty acres in extent—that is all I know of.

Q. In and around—in close proximity to the Coyote Spring, are there any ruins of any adobe houses or walls?

A. No, sir, not that I have even seen.

Q. What is the condition of the country so far as ruins and apparent use and occupation of it—when you first knew it?

A. As it is now. It has been used as long as I have been in that section of the country. The sheep people use it for lambing purposes in the spring, and build corrals and such as that around it, but buildings and walls I have never seen there.

Q. Have you ever been up and down the canyon?

A. Yes, sir, hundreds of times.

Q. Have you been north and south of it on the hills?

A. Yes, sir.

Q. Have you been east and west of it?

A. Yes, sir.

Q. As early as 1880?

A. Yes, sir.

Q. How far is that spring from the Turquoise mines claimed by The American Turquoise Company, if you know?

A. It is about two miles.

Q. What direction are the mines from the spring?

A. It would be northwest.

Q. Do you know Mr. J. P. McNulty?

A. Yes, sir.

Q. How long have you known him?

A. I have known him since about 1886 or 1887.

146 Q. I will ask you to state, if you know, about when he went out to the Turquoise mines?

A. It was in 1892. I was living on my property at that time.

Q. Do you know who was out there before McNulty came?

A. A man named Graves and Mr. Storey and Mr. Allen.

Q. Do you know what is called the Castillian mine?

A. Yes, sir.

Q. How long have you known that?

A. Since the year 1880.

Q. Describe its condition to the court and jury, and whatever you may know about it from the time you went down there.

A. I leased the property that year from a man named Marshall and sunk a shaft and timbered it and cleaned out the old diggings and timber. It was done to my recollection about 45 feet. I leased on it for 14 or 15 months, then the owner took it back. The next man there was a Mr. Parmalee, Milton Parmalee—that is my recollection.

Q. Do you know anything about what is called the Gem mine?

A. Yes, sir.

Q. What do you know about it?

A. That first came to my notice I think in 1894.

Q. By whom?

A. By a man named Storey and Allen—they were both partners on that property—J. F. Allen, was the name.

Q. In the year 1894?

A. That is my recollection of it.

Q. What was done on it if you know?

A. When I saw the property at that time it had a shaft on it, it seems to me 25 or 30 feet deep, in that neighborhood.

Q. You testified that McNulty went there in 1892.

A. But this is the first time I happened to go to that shaft—that is, to this property called the Gem.

Q. Now about the Muniz mine—do you know anything about that?

A. Yes, sir.

Q. When did you first know about the Muniz?

A. That location I happened to go up to the day the boys came out and located it.

Q. Who were they?

147 A. Three brothers—named Muniz.

Q. What work if any was done on that—what was its condition?

A. The first time, when they made their location, they were down four or five feet in depth.

Q. What if any improvements were made at that time, or about that time, if any?

A. The first time I saw it, that was early in 1891, there was something like three or four feet in depth, along there.

Q. Was there any improvements on it such as houses?

A. They had some tents—there was no house there at that time.

Q. Was there a house ever put on it afterwards?

A. Later; yes, sir.

Q. Who by?

A. By the Muniz people.

Q. The Morning Star, do you know anything about that claim?

A. I heard about that about the same time as the Sky Blue, that was in 1894.

Q. Who was there in charge of that at that time, if you know?

A. Mr. McNulty was in charge at the time, but the location had been made by Storey and Allen.

Q. How are those mines located, one with reference to the other?

A. They are south and east of the Muniz, and east of the Castillian. I am assuming my right hand to be east. The Muniz is on the hill, and the others are in a southeast course, and the Castillian was over on the other little hill to the west.

Q. Are those mines close enough together to be called in mining terms, what they call a "group"?

A. We always considered it such.

Q. They are in the immediate vicinity?

A. Yes, sir.

Q. I will ask you to state, if you can, if you know the names of the arroyos down there in that country in and around the Coyote Spring?

A. Yes. The Gallinas is on the northeast; the Coyote is southwest; the San Marcos is still south of that.

Q. Did you ever hear in that country and in that immediate vicinity of an arroyo or a name such as the "Arroyo del Oregano"?

148 A. No, sir; I never did.

Q. Or the Questa del Oregano?

A. No, sir.

Q. Or the "Arroyo Cuesta del Oregano"?

A. No, sir.

Q. When was the first time you ever heard of the claim of Mariano Sena to this property down there under a grant?

A. About six or seven years ago.

Q. When did you ever hear of a claim of Leyba, or a grant down there?

A. No, sir; I never did.

Q. What was your habit of inquiry with reference to the location

of land grants and patented lands and claims in there in doing your prospecting?

A. Well, if you want to go to early dates, I will tell you what brought me to that section of the country.

Q. I don't care to know your personal habits. I mean your habits of inquiry if any, with reference to whether or not you could locate your mines on private property or public domain, and whether there was any private property in the public domain?

A. I came here on an old map that was given to me in Leadville, Colorado, showing this country, and showing what was supposed to be grants and what was supposed to be government domain, and when I came here, that was one of the properties I came to locate,— what was known as the Old Castilian mine. I came here in 1878 for that purpose, and when I came here it was located.

Q. Following that did you make any inquiries with reference to the location of land grants down in that country?

A. Yes, sir.

Q. Did you ever hear of the Jose de Leyba grant?

A. No, sir.

Q. Did you ever hear of the Leyba's having any interest in property there?

A. No, sir.

Q. Ever make any inquiry at the Surveyor General's office?

A. I did, carefully.

149 Q. Did you make any inquiry in the office of the Register of the land office?

A. I did through the Surveyor, Mr. Atkinson, and his clerk, David Miller. I had plats and a map of all that section, but when my camp was burned up in 1893, I had about a dozen of those old maps that went up in smoke; some of the maps were made by Atkinson and D. L. Miller, to all that country below there, both of the government and grant lands.

Q. Who, if anybody, was occupying and controlling or occupying the Muniz mine prior to McNulty going out there?

A. A man named Graves.

Q. Who was he?

A. I presume he was an agent under Mr. Storey. I don't know any of their private matters.

Q. I am speaking of the Muniz mine particularly.

A. Oh, this was after the property went into the hands of Allen and Storey. They were in the east at the time, and this man Graves was their agent at the time.

Mr. CLANCY: You mean as far as you know.

A. Yes, I stated that—so far as I know.

Mr. CLANCY: I ask that that be stricken out.

Mr. REYNOLDS: That part relating to Graves, I am perfectly willing to have stricken out.

Mr. REYNOLDS:

Q. Now who was in possession or control of the property appar-

ently so far as you know, of the Gem Lode, prior to McNulty going there?

A. This same man Graves.

Q. And the same applied to all these mines there?

A. Yes, sir; so far as I know. He had all the interests of the men Allen and Storey to these properties, outside of the Muniz and Castilian. I never became familiar with them, or happened to go to where they were until 1894—that was my first knowing them, but he must have been there. He done the assessment work there as far as I know up to that time.

The COURT: He was commonly reputed to have charge of them?

A. Yes, sir.

Cross-examination by HARRY CLANCY:

Q. In your residence of 25 years in the neighborhood of the Turquoise mines, you have become familiar with many of the natural objects on the earth's surface in that locality, have you not?

150 A. Yes, sir.

Q. Did I understand you to say that the Coyote Spring was located at the end of a draw called the Gallinas Draw?

A. I did not say a draw, I don't think—it is south of it. I could not say how far south; the *draw* is quite level except when you get into the foot-hills, it becomes quite broken, and the spring from that down is almost in a box canyon for two miles and a half, until you get to the place called "Poverty Hollow."

Q. How is the arroyo where the spring is situated, above the spring?

A. It is all broken up the same as it is east of it.

Q. This arroyo in which the spring is situated, have you known that arroyo by any name?

A. Only as Coyote Canyon.

Q. How far above the Coyote Spring does this Coyote Canyon extend?

A. I don't understand you.

Q. Above, as the water comes down, in whatever direction the water may run?

A. The spring is in the Coyote Canyon. It is a little stream of water in what is known to us as Coyote Canyon.

Q. And from the Coyote Spring, do I understand you, there is a stream of water flowing?

A. A small stream; yes, sir.

Q. Is there any water flowing in that arroyo above the spring?

A. Not that I know of.

Q. What is the character of this arroyo right at the spring, so far as the banks of the arroyo are concerned?

A. In the way you speak of it, I do not understand it as a spring. The water comes out on both sides of the canyon. I don't know what you call the spring, whether here or there (indicating on a plat—it comes out on both sides of the canyon and extends down or nearly two miles before it sinks into the gravel.

Q. Now what you understand to be the Coyote Spring, and this

canyon in which you state it is situated, how far up that canyon or arroyo have you followed above the spring?

A. I have been up there to the Santa Fe mountains.

Q. Does that arroyo extend all the way to the Santa Fe mountains?

151 A. No, sir, it extends probably one-half or three-quarters of a mile and then it becomes table land or mesa.

Q. Right at the Coyote Spring, is there any trail that crosses the arroyo?

A. There is a great many sheep trails. I could not tell whether one or one hundred.

Q. Is it not possible right at the Coyote Spring to drive a team across that arroyo and proceed on to San Marcos Springs for instance?

A. No, sir. I am not familiar with that.

Q. Do you say you could not drive a team of horses across that arroyo immediately at the spring from one side to the other?

A. I do. Because there is points there where it is from 75 to 150 feet in height.

Q. Now, Mr. O'Neil, did you ever hear of that canyon you spoke of called by any other name?

A. No, sir.

Q. And you are reasonably familiar with the natural objects in that general vicinity are you not?

A. Yes, sir.

Q. Did you ever hear of the Arroyo de la Piedra?

A. No, sir.

Q. You don't know that—Are you familiar with the Arroyo de las Gallinas or Canada de las Gallinas?

A. I don't know the Canada—unless it is this Vega—but that is not what I would call a canada.

Q. I say Canada, I did not say Vega.

A. I don't understand your question.

Q. You know where the homestead location of Tom Whalen is?

A. Yes, sir.

Q. Did you ever know of it to be in the Canada de las Gallinas?

A. That is the place.

Q. Did you ever follow that Canada de las Gallinas or Arroyo de las Gallinas down to where it empties into a larger arroyo or a larger canyon?

A. I have followed it down to where it goes into a box canyon.

Q. How far above the junction of those two arroyos where
152 the Arroyo de las Gallinas empties, how far above is the Coyote Spring?

A. That I could not tell you positively.

Q. More or less?

A. It seems to me it is below the old man's ranch you spoke of—a half or three-quarters of a mile.

Q. I am not asking from the old man's ranch. I am asking from the point where the Arroyo de las Gallinas runs into what you call

the Coyote Canyon. How far above that junction is the Coyote Spring?

A. I don't understand it as you state it. The Arroyo Gallinas is the headwaters of the Coyote, as I understand it.

Q. Then do I understand you where the Gallinas empties into the canyon, the spring is right at that point?

A. I could not exactly tell you.

Q. Is it above or below it?

A. It is in that canyon.

Q. Then you cannot tell in regard to the Arroyo de las Gallinas?

A. It is below this man's ranch. I never measured it. I have been up and down it a good many times, but I could not tell you the exact distance.

Q. I am not assuming that the Coyote Spring is in the Arroyo de las Gallinas, I am assuming it is in the Canyon of the Coyote, as you say it is. Now don't you understand?

A. Yes, sir.

Q. You say the Arroyo de las Gallinas runs into the Canyon of the Coyote?

A. Yes, sir.

Q. Now from the point where that empties in, how far either up or down the Coyote Canyon, is the Coyote Spring?

A. That question I could not answer more than this—What we call the Gallinas is a vega, and as it comes into the south or becomes steeper, and as it goes south it is called Coyote Canyon, as it goes out on the vega it is called the Cañada, but they are continuous all the way through.

Q. This Canyon Coyote, you have never heard referred to as the Arroyo de la Piedra?

A. No, sir; I never have.

Q. Did you ever hear of a locality known as the Cañada Juana Lopez?

A. Yes, sir; I have.

153 Q. Do you know where that is situated?

A. Yes, sir.

Q. Where is it?

A. It is in the canyon—

Q. Don't confuse the canyon with the Cañada.

A. I am not familiar with the Spanish names. I do not understand the Spanish language, only just in a small degree, but there is a great many names I get mixed up in.

The COURT: Explain the difference between a canyon and a cañada.

Mr. CLANCY: A canyon is where the walls are practically abrupt, not necessarily perpendicular, and a cañada is where the walls may be rather high, or rather low, and the land spreads out.

WITNESS: That is what I call a vega.

Mr. CLANCY: A vega is a meadow.

WITNESS: I am not versed in the Spanish language, but I know a good many words.

Q. Well, to return to the Cañada Juana Lopez—where do you say that is?

A. It is west of Bonanza.

Q. Now do you know where the Cañada de los Cerrillos is?

A. No, sir; I do not, without it is the Galisteo river.

Q. Do you know the location of the Cerrillos grant?

A. Not all together. I know part of it, that is, I know what is termed the north end of it. It would be the east end.

Q. How do you happen to know the east end of it?

A. Well, I have got property that is adjoining the Castillian mine. I had it surveyed in 1897, and the south line of the Cerrillos Grant or tract as they call it at that time, took in a part of the property I have located.

Q. Are you acquainted with the Sitio de Juana Lopez?

A. No, sir; I don't know a name of that kind.

Q. Are you acquainted with the Sitio de los Cerrillos?

A. No, sir, not by that name.

Q. Do you know where the Penasco Blanco de las Golindrinas is?

A. No, sir, I do not.

Q. Do you know where the Guicu Arroyo is?

A. No, sir.

Q. Do you know a locality called "El Arco" down there?

154 A. No, sir.

Q. Do you know a place called Los Cerrillos, not the railroad town, but another place, Los Cerrillos?

A. Well, Bonanza used to be called that by the Mexican people. It is simply a name I passed over. I can't tell you whether it was right or wrong; to the Americans it has been known as Bonanza, but I have heard it called Los Cerrillos.

Q. Right where the Turquoise mines are located, what is the highest peak there known as?

A. The Turquoise Peak.

Q. Down in that locality are you acquainted with the Cerrito de Juana Lopez?

A. No, sir.

Q. You speak some Spanish, do you not?

A. Very little.

Q. Well acquainted with all the people living in that section of the country who are natives or speak the Spanish language?

A. Fairly well; yes, sir.

Q. You have derived your information in regard to many of these localities from the Mexican people, have you not?

A. No, sir; I never did. The few points I have got, I got from the land office here in regard to surveys. These names, I never paid any attention to them.

Q. I am speaking about the names of localities?

A. I never got them except from others.

Q. From whom did you get the information in regard to this Coyote Canyon—who told you that was Coyote Canyon?

A. I have heard it called so by the natives.

Q. Can you tell what particular native—mention his name?

A. Why, Nasario Gonzales, and Andres C. de Baca—such people as them.

Q. Andres C. de Baca has told you that was the Coyote Canyon?

A. Yes, sir.

Q. Anybody else?

A. Yes, a number of them. It has been the name among the natives ever since I have been in the country.

Q. What other natives have ever told you that is the Coyote Canyon?

A. Why, Frank Gonzales, Juan Narvais, Nick Narvais.

Q. Can you recollect anybody else?

155 A. Jesus Montoya.

JAMES PATRICK McNULTY recalled.

Cross-examination continued by Mr. F. W. CLANCY:

Q. Such possession you had of these claims you testified to you have always claimed to be under mining locations, made under the United States land laws, haven't you?

A. Yes, sir.

Q. Do you know where the surveyed line of the Cerrillos Grant is near where the mines are?

A. I do. I know one corner stone. I know where the old survey was. That took in a part of the Muniz mine.

Q. Did it take in any of the others?

A. Yes, the Morning Star and the Castillian.

Q. But the new survey left them out?

A. Yes, sir.

Q. Do you remember when the new survey was made?

A. I really forget now.

DIEGO MARES sworn.

Direct examination by S. B. DAVIS, JR.:

Q. State your name?

A. Diego Mares.

Q. Where do you reside?

A. I live in Precinct No. 6, Santa Fe county.

Q. In what town is that?

A. La Cienega.

Q. Are you acquainted with the mining claims known as the Muniz, the Morning Star, the Gem, the Sky Blue, and the Castillian?

A. I know the Castillian and the Muniz. That is all I know.

Q. How long have you known the Castillian mine?

A. Since it was discovered.

Q. And when was that?

A. I don't remember exactly, but I think it was in 1880.

Q. Who was in possession of it, who was working it at that time, if any one?

A. A gentleman by the name of Marshall.

Q. And then after him who worked it?

A. I don't know who worked it **after** Marshall.

Q. Do you know Mr. McNulty?

A. Yes, sir.

Q. How long have you known him?

156 A. I have known him since 1886.

Q. Did you ever know of him at any time to be working there or in possession of those mines?

A. Yes, sir.

Q. Now when did you first see McNulty in possession of those mines, or working them?

A. I don't recollect the exact year.

Q. More or less, what year?

A. More or less 1893 or 1894, I am not sure.

Q. Now speaking of the Old Castillian mine, who, if you know, was working that mine immediately before McNulty came there?

A. A man named Storey.

Q. Now, take the Muniz mine—Who was working that mine before Mr. McNulty came there, if any one, to your knowledge?

A. Mr. Storey worked it.

Q. More or less, for how many years prior to the time when McNulty came there did Storey work that mine?

A. More or less about three years.

Q. Now who worked the Muniz mine before Storey worked there, if anybody?

A. I do not know of anybody.

Q. Is there a house on the Muniz mine?

A. Yes, sir.

Q. Do you know who built that house?

A. Yes, sir; Faustin Muniz.

Q. Do you know about when that house was built, about how many years before McNulty came there?

A. No, sir.

Q. Was it before or after Storey worked the mine?

A. Before Storey worked the mine.

Q. Did you ever see the Muniz's working the mine?

A. Yes, sir.

Q. Before or after Storey came there and worked it?

A. Before Storey worked it.

Q. Who, if anybody, lived in that house on the Muniz mine?

A. I only saw Muniz's live there.

Q. Who lived there after Muniz got through?

A. Mr. Storey.

Q. And after Storey, who lived there?

157 A. Mr. McNulty.

Q. Who has been working these mines, if anyone, to your knowledge, since the time when Storey lived there, and since the time Storey left them?

A. Only Mr. McNulty.

Q. Do you know some other mining claims near to the Muniz mine?

A. I know there are mines there, but I do not know the names.

Q. How many claims do you know join the Muniz?

A. I only know the Muniz mine.

Mr. REYNOLDS: I desire to ask him about the location of the country down there.

The COURT: You may proceed.

Mr. REYNOLDS:

Q. How long have you known that country in and around the mines?

A. I know the place since I was fifteen years of age.

Q. How old are you now?

A. Fifty-eight years.

Q. Do you know where the Coyote Spring is?

A. Yes, sir.

Q. When did you first know it?

A. When I was of that age.

Q. Have you been down in that country often?

A. I have been there very often.

Q. Do you know the name of the arroyo in which the Coyote Spring is situated?

A. Yes, sir.

Q. What is the name?

A. It is the Arroyo de la Cañada de las Gallinas.

Q. Have you been familiar with that country and the people down there since you were a boy, fifteen years old?

A. Yes, sir. I was herding cattle there for about a year.

Q. Did you ever hear among the old people, or from any other source of the Cuesta de Oregano?

A. No, sir.

Q. Did you ever hear of the Arroyo de la Oregano?

A. No, sir.

Q. Or the Arroyo Cuesta de la Oregano?

A. No, sir. I have heard many who were very old there and I never heard that name mentioned of the Arroyo de la Oregano, or the Cuesta de la Oregano.

158 Q. Do you know the location of the San Marcos Spring?

A. Yes, sir.

Q. How far is that from the Coyote Spring?

A. About two miles distant.

Q. Is it north or south of the Coyote Spring?

A. South.

Q. When you first went down there into that country was there any ruins of old adobe houses, or houses near or in the immediate vicinity of the Coyote Spring?

A. No, sir.

Q. You were over that country carefully?

A. Very carefully.

Q. Was there any ruins south of it any distance, and if so, what?

A. There were the ruins of corrals, where sheep had been lambing.

Q. I am speaking now of adobe houses—walls three or four feet high. Did you see any such ruins?

A. No, sir.

Q. Are there any ruins down around San Marcos Spring?

A. Yes, sir.

Q. Are there any other ruins in that immediate vicinity within two or three miles of the Coyote Spring, except the San Marcos ruins?

A. No, sir.

Q. When, if you ever did, did you first hear of the claim of Mariano Sena to the land grant down in that country?

A. I never heard it until the same Mariano Sena sent me a letter with a blank so I might fill it out to transfer to him the right which I have there which consists of 160 acres of land under a patent.

Q. When was that land patented?

A. I took the land in 1887, and I obtained the patent five years thereafter.

Q. Did you ever hear from anybody of the Leyba Grant prior to that time?

A. No, sir.

Q. Did you ever hear of anybody down there in that country or know of anybody or hear of anybody in that country claiming that property or the ownership under the Leyba Grant?

A. No, sir; never.

159 Q. Was there anyone down in that country when you went there in and around Coyote Spring, or up to the Turquoise hill, Cerro Palado? Do you know that place?

A. Yes, sir.

Q. Is that the location of the present Turquoise mines?

A. Yes, sir.

Q. Did you know of or hear of anybody claiming a land grant known as the Leyba Grant down in that country?

A. No, sir; never.

Q. Covering any portion of the Coyote Spring, or the Hill Cerro Palado?

A. No, sir; never.

Cross-examination by H. S. CLANCY, Esq.:

Q. Where do you say you live?

A. At La Cienega.

Q. How long have you lived there?

A. I was born there.

Q. How long have you lived in La Cienega?

A. I have lived some years. My present residence is at La Cienega, but I absent myself from there when I go to work, but I return to La Cienega, as I have my residence there. I recognize that precinct as my residence.

Q. You say you have your residence and house at La Cienega,—have you any other house?

A. I have a house in Waldo when I go to work there.

Q. No others?

A. No, sir.

Q. You never built a house on this homestead entry of yours?

A. Yes, sir.

Q. How does it happen you answered just now that you had no other houses?

A. That does not matter in this business.

Q. Kindly answer my question. You just stated that you had a house at La Cienega, and another house at Waldo, and that you had no others, and now you state that you did have a house on this land to which you hold a patent.

A. Yes, I have a house there. I have three houses.

Q. No more?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

160 Q. You are very familiar with the localities down in that section of the country?

A. Yes, sir.

Q. Did you ever hear of an arroyo in that country called the Arroyo de la Piedra?

A. Yes, sir.

Q. Will you tell the court and jury where the Arroyo de la Piedra is?

A. Yes, sir.

Q. Please do so.

A. The principal arroya which we call the Arroyo de las Gallinas connects with the Arroyo of the Ojo del Coyote, a distance of about 200 yards from the spring below, and we call it the Arroyo de la Piedra.

Q. Yes, you have told the truth—that is the description of it. Now, Mr. Mares, where the Arroyo de las Gallinas runs into the Arroyo de la Piedra, how far from that point is the Ojo del Coyote?

A. Where the Arroyo Coyote connects with the Arroyo Gallinas about a distance of 200 yards, from there on we call it the Arroyo de la Piedra.

Q. I am asking you about the Ojo del Coyote?

A. About 150 yards, more or less. I cannot give it exactly.

Q. Now, do I understand you that the Ojo del Coyote is situated in what you call the Arroyo del Coyote?

A. Yes, sir; in the Arroyo del Coyote.

Q. Now how far above where the Arroyo de las Gallinas comes in, is it above or below that junction?

A. It is to the east—above.

Q. Now will you describe to us the surroundings right at the Ojo del Coyote. The character of the banks of the arroyo?

A. I can give you a description more or less. The most of it is an arroyo, and after you come up from the bottom of the arroyo to a distance of fifty feet, everything is high on either side until you get to fifty paces above, then it gets more level but it is arroyos and banks.

Q. Right where the water first appears, in what you call the Ar-

royo del Coyote, is it not possible to drive a wagon and horses across the arroyo?

A. With a great deal of difficulty.

Q. At that point is there not a trail that crosses the arroyo, 161 that goes to the Ojo San Marcos?

A. Yes, sir, there is.

Q. And you say that with some difficulty a team can be driven across the arroyo at that point?

A. A team can cross there with difficulty, but it can cross.

Q. You say you have never heard of the Cuesto del Oregano?

A. No, sir.

Q. Is it not true that to the south and east of Coyote Spring, there is a Cuesta?

A. There is, yes, sir; to go to the hills.

Q. But you have never heard that called the Cuesta del Oregano?

A. No, sir, and I worked there when I was a little boy.

Q. And you never heard of the Leyba Grant?

A. Never. Never.

Q. Are you acquainted with the Cerrillos Grant?

A. I know one grant of the Cerrillos, as we call it before the railroad came we used to call it Cerrillos, and afterwards they changed the name—we do not know why.

Q. Was it known as the Cerrillos Grant?

A. I don't know it.

Q. Do you know of the Sitio de los Cerrillos?

A. No, sir.

Q. Did you ever hear of the Sitio de Juana Lopez?

A. No, sir, neither.

Q. You are acquainted with the Cañada de Juana Lopez, are you not?

A. Yes, sir.

Q. And you are acquainted with the Cañada Guicu?

A. Yes, sir.

Q. Are you acquainted with the Penasco Blanco de las Golondrinas?

A. Yes, sir.

Q. You have known that for many years?

A. Yes, sir.

Q. It is a well known land mark in that vicinity is it not?

A. Yes, sir. It is known as Penasco Blanco.

Q. Do you know the Cerrito de Juana Lopez?

A. Yes, sir.

Q. Where is the Cerrito de Juana Lopez situated?

A. From where?

162 Q. Well, say from Pino's Ranch?

A. It is to the west from Pino's Ranch.

Q. Have you ever heard of a canyon known as the Canyon of the Coyote?

A. No, sir.

Q. Do you know of a mountain peak, in that locality, called Cerro Viejo?

A. No, sir.

Q. Did you ever hear of the land grant in that section of the country known as the Pueblo Viejo de la Cienega?

A. No, sir.

Q. Do you know where the Pueblo Viejo de la Cienega is?

A. No, sir; I never heard of it.

Q. And I believe you stated that you were well acquainted with the natural objects in that vicinity?

A. What do you mean by that?

Q. Didn't you state before in your testimony that you were familiar with the natural objects on the earth's surface, in that locality?

A. Ask me what you want and I will answer you.

The COURT:

Q. You know the hills and canyons there do you?

A. Yes, sir, I know the hills and the canyons and the rods and the trails and the arroyos and the embankments.

Mr. CLANCY:

Q. Are you acquainted with the old road that goes from Los Cerrillos to Pecos?

A. No, sir, I do not know it.

An adjournment was here taken until Friday morning, September 1st, 1905, at 9 o'clock a. m.

FRIDAY MORNING, *Sept. 1, 1905*—9 a. m.

Mr. REYNOLDS to Court: After consultation with Mr. Davis, and the fact that we have pretty near tried the case, I would ask leave now to withdraw the demurrer to the evidence and we will go ahead with the case relieved of it, and let it stand as it was.

Mr. REYNOLDS: I desire now to offer in evidence a plat of Mineral Survey No. 1087, Cerrillos Land District of the claim of the American Turquoise Company, known as the Gem Group, in the Santa Fe Mining District, showing the Morning Star, the Muniz, the Gem and Sky Blue lodes, dated Feb. 2nd, 1901.

163 Marked Defendant's Exhibit No. 61.

Mr. REYNOLDS: I also offer in evidence Mineral Survey No. 1086 of the claim of the American Turquoise Company, known as the Castillian lode, in the Cerrillos Mining District, survey and plat dated January 23rd, 1901.

Marked Defendant's Exhibit No. 62.

ALEJANDRO MONTOYA, sworn.

Direct-examination by M. G. REYNOLDS, Esq.:

Q. What is your name?

A. Alejandro Montoya.

Q. What is your age?

A. I have sixty-nine years.

Q. Did you testify in the case of Sena vs. The United States and the American Turquoise Company, in the Court of Private Land Claims in the year 1899 or 1900?

A. I am not certain about it.

Q. Where do you reside?

A. I live at Cerrillos.

Q. How long have you lived there?

A. About 18 or 19 years.

Q. Where were you born?

A. At La Cienega, on the Santa Fe river, below here.

Q. How long did you live there before you went away?

A. I lived there about 18 or 19 years ago.

Q. What is your business?

A. I work at the slaughter house.

Q. Do you know where the location of the Cerro Pelado is, down below Cienega?

A. Yes, sir.

Q. Do you know whether it is called by any other name?

A. No, sir.

Q. Do you know the location of the Turquoise mines, which Mr. McNulty is alleged to have had charge of?

A. Yes, sir.

Q. Where are these mines with reference to the Cerro Polado?

A. To the south, I think.

Q. Are they close to it or far away from it?

A. Those I know are right at the foot of the hill.

Q. How long have you known that country there?

Q. I have known that place since I can remember.

164 Q. Are you familiar with the country in and around San Marcos Pueblo—the old Pueblo?

A. Yes, sir.

Q. Do you know the location of the spring called the Coyote Spring. Do you know that spring in that country?

A. Yes, sir.

Q. How long have you known that?

A. I have stated that I know that place ever since I can remember, and I have been there a great deal.

Q. Do you know the name of the arroyo or Cañada in which it is located or near which it is located?

A. Yes, sir.

Q. What is the name of the cañada?

A. There are two cañadas that come together.

Q. What are they?

A. That of La Gallinas, and the other one is called the "Cañada Arroyos."

Q. Do you know the cañada by any other name?

A. No, sir.

Q. Did you ever hear of, at any time during your life, the name of a place down there called the Arroyo Cuesta del Oregano?

A. No, sir.

Q. Or the Arroyo Oregano?

A. No, sir.

Q. Or the Cuesta of the Arroyo del Oregano?

A. No, sir.

Q. When did you first, if you ever did, hear of this claim of Mariano Sena for a grant down there in that immediate country?

A. I have not heard of it.

Q. Are you acquainted with the old people in that country?

A. Yes, sir. I know some old people there.

Q. Did you ever hear of what is called the Jose de Leyba Grant, down in that country?

A. No, sir.

Q. Did you ever know of anybody down in that country, or being down there at any time, or heard of anybody being down there at any time, during your recollection, claiming to own or claiming to have any interest in what is known as the Jose de Leyba Grant?

A. No, sir.

165 Q. Were you acquainted with Nasario Gonzales in his life time?

A. Yes, sir.

Q. Is he living or dead?

A. He is dead.

Q. Do you know whether Nasario Gonzales, deceased, is the same man who was up at the land court at the time the case of Sena vs. The United States was tried up at the Federal building?

Mr. CLANCY: I will admit that Nasario Gonzales referred to is the one that is dead.

Mr. REYNOLDS: That is all I want.

Q. What is the character of the country in and around the Cerro Pelado?

A. From the Cerro Pelado it is prairie on this side.

Q. What were you doing down there in that country when you were there as a young man?

A. I used to herd sheep for my father.

Q. How old were you?

A. I must have had about 25 years of age.

The COURT:

Q. That is when you first went there?

A. Yes, sir.

Cross-examination by Mr. H. S. CLANCY:

Q. Are you the same Alejandro Montoya who testified before the Land Court in Sante Fe up in the Federal building in the year 1900?

A. Yes, sir.

Q. Did you testify at that time that you were 77 years of age?

A. I do not know.

Q. You state now that you are 69 years of age.

A. I desire the court and lawyers to excuse me if I make a mistake. I am quite deaf, and I do not hear well and I am liable to make mistakes at times.

Q. You say you are well acquainted with the Ojo del Coyote?

A. Yes, I have been there at the Ojo del Coyote.

Q. Will you describe to the court and jury the surroundings of the Ojo—the kind of an arroyo it is situated in?

A. I have stated that it is in the Cañada de las Gallinas.

Q. Didn't you state a few minutes ago that it was situated in the Arroyo Canyon?

166 A. No, sir, I did not. I said in the Canada del Arroyos.

Q. And now you state it is in the Candada del Gallinas.

A. The Canada de las Gallinas and the Canada Arroyo come together below where the spring is.

Q. Do you mean where the water comes out of the ground is above where the Canada de las Gallinas and the Canada de Arroyos come together?

A. No, sir, it is below.

Q. It is below that junction?

A. Yes, sir, it is a little below the junction of the arroyos.

Q. What is the arroyo below the junction called?

A. Just below the junction of the arroyos it is called El Coyote.

Q. Did you ever hear of an arroyo in that locality known as the Arroyo de la Piedra?

A. Yes, sir. It is below the Coyote.

Q. Is it the same arroyo in which the Coyote Spring is situated?

A. Yes, sir.

Q. Now directly at the Ojo del Coyote there is a trail across the arroyo going towards San Marcos, is there not?

A. Yes, sir, there is one.

Q. And at that point it is possible to drive a wagon and a team across the arroyo, is it not?

A. Below the arroyo you can pass with a team and wagon, but above you cannot for it is a trail only.

Q. Below the spring you can pass with a wagon?

A. Below the arroyo there is a road that you can pass with a wagon, above is a trail.

Q. How far below the spring is the wagon road?

A. It must be about 100 yards, a little more or less.

Q. Below the spring?

A. Yes, below the spring.

Q. You have stated that you have never heard of a land grant in that vicinity known as the Jose de Leyba Grant?

A. No, sir.

Q. Did you ever hear of a locality in that neighborhood known as the Sitio de los Cerrillos?

A. No, sir, not by that name.

Q. Did you ever hear of a locality known as the Sitio Juana Lopez?

A. I know Juana Lopez.

167 Q. I am asking you about the Sitio Juana Lopez, and not the Merced de Juana Lopez?

A. You mean where the Juana Lopez is situated?

Q. I do not mean where the house of Juana Lopez is situated. I mean a locality known as the Sitio Juana Lopez?

A. No, sir.

Q. Are you acquainted with the Penasco Blanco de las Golondrinas?

A. Yes, sir.

Q. You are well acquainted with that rock?

A. Yes, sir.

Q. Did you ever hear of a land grant in that neighborhood known as Los Cerrillos?

A. No, sir.

Q. Did you ever of a land grant in that neighborhood known as the grant of Sebastian de Vargas?

A. No, sir.

Q. Did you ever hear of a grant in that vicinity known as the Pueblo Viejo de la Cienega?

A. No, sir.

Q. Do you know where the Pueblo Viejo de la Cienega is?

A. I have seen at the Mesita Cienega where the Cienega commences it looks like an old Pueblo.

Q. There are ruins of an old Pueblo there are there not?

A. Yes, there are ruins there.

PEDRO MUNIZ, sworn.

Direct examination by S. B. DAVIS:

Q. What is your name?

A. Pedro Muniz.

Q. Where do you reside?

A. Here in Santa Fe.

Q. How old are you?

A. I am going on 50 years.

Q. Do you know a man named Faustin Muniz?

A. Yes, he is my brother.

Q. Is he living or dead?

A. He is dead.

Q. Do you know a mine or mining claim situate in Santa Fe County, known as the Muniz mine?

A. Yes, sir.

168 Q. Did you ever have any connection with that mine at any time?

A. Yes, sir.

Q. What was it?

A. I worked there in 1890, when my brother and myself built a house there. After having worked it about a year we sold it to a Mr. Storey.

Q. What was your relation to the mine that you were able to sell it to Mr. Storey?

A. We had worked there, and he offered to buy our work there.

Q. Do you know who located the mine?

A. Myself and my brother.

Q. Do you know a mine located near the Muniz mine known as the Old Castillian?

A. Yes, sir.

Q. In 1890, when you were working the Muniz mine, was anybody working the Castillian mine?

A. I saw Mr. Cartwright and Parmalee work there before.

Q. Do you know how long before 1890, they worked that mine?

A. No, sir.

Q. Did you ever see Mr. Storey working that mine?

A. Yes, sir.

Q. In what year?

A. In the years 1890 and 1891.

Q. Do you know J. P. McNulty?

A. Yes, sir.

Q. Who has been working the mines if you know since 1891?

A. Which mines?

Q. The Muniz and the Castillian?

A. I have seen Mr. McNulty only.

Q. I believe you stated that you and your brother built a house on the Muniz mine?

A. Yes, sir.

Q. Did you live there?

A. Yes, my brother lived there, and he had some goats there and herded them there before we sold the mine.

Q. And after you and your brother ceased to live in that house, who, if anybody, lived in it?

A. Mr. Storey, the man to whom we sold.

169 Q. And after Mr. Storey?

A. Mr. McNulty.

Q. Do you know a spring in that general locality known as the Ojo del Coyote?

A. Yes, sir, I have passed by it.

Q. When were you there first?

A. I think in the year 1870, when Mr. White went to survey that land.

Q. Can you describe that spring?

A. At that time I did not know Ojo Coyote, because we camped at the Ojo San Marcos.

Q. When did you first get to know the Ojo del Coyote?

A. About the year 1867. I was then very young. A man and myself were coming from Galisteo to Santa Fe, and we came on the trail that comes right by the Ojo.

Q. Did you camp there at that time?

A. No, sir, we only passed by.

Q. Did you observe any ruins near the spring at that time?

A. No, sir.

Q. Did you see any ruins of the old house or walls standing up two to five feet high?

A. No, sir, I did not see any.

Q. Are you acquainted with the country for a mile or two around Coyote Spring?

A. Yes, sir, I have said I passed by.

Q. Have you ever seen any ruins such as I have asked you about within those limits?

A. No, sir.

Q. Do you know a place called the Cuesta del Oregano?

A. No, sir, I have not heard it mentioned except in the last few years.

Q. Before the last few years did you ever hear it mentioned?

A. I have heard some people talking that there is a "Cuesta Oregano," but I have not known it.

Q. When did you hear that talk?

A. From the time it was said that there was a Leyba Grant there.

Q. Have you ever heard of a place called the Arroyo del Oregano, and Cuesta Arroyo del Oregano?

A. No, sir, I have not heard of it.

170 Q. Now when did you first hear of a grant known as the Leyba Grant?

A. I bought from an American there the right to mine, and I came to take Mr. White for the purpose of having some surveying, and when he arrived at the place he told me that there was a grant which was called the Jose de Leyba Grant.

Q. Now when was that?

A. In the year 1896.

Q. What, if anything, did you do after you heard that there was a Leyba Grant down there?

A. I hunted up one of the heirs and I bought an interest in the grant.

Q. From whom did you buy that interest?

A. I bought it from Salvador Leyba. I gave him \$175.00 for it.

Q. Did you take a deed from him?

A. Yes, sir.

Q. Have you got that deed?

A. Yes, sir. Here it is. (Witness here took deed from his pocket and handed same to counsel.)

Mr. DAVIS: I offer this deed in evidence. Marked Defendant's Exhibit No. 63.

Mr. REYNOLDS: The record can show that the deed is for an undivided $\frac{1}{2}$ interest in the Leyba Grant for \$175.00.

Mr. DAVIS:

Q. Were you ever acquainted with a man named Jesus Narvais?

A. I knew some people by the name of Narvais, but I don't remember his first name.

Q. Do you remember a man named Jesus Narvais, who testified in the hearing of the case of Mariano F. Sena vs. The United States, in the Court of Private Land Claims in 1900?

A. I am not certain. A man named Narvais worked with me on the Muniz mine.

Q. I mean an old man named Narvais who testified in that case?

A. I don't remember.

Cross-examination by H. S. CLANCY, Esq:

Q. When did you say that you first visited the Coyote Spring?

A. It was in about the year 1868. That was the second time I was there.

Q. I asked you for the first time you were there?

171 A. As I said before when I went with Mr. White in the year 1870, I heard it spoken of.

Q. You do not understand my question. When was the first time that you visited the Coyote Spring?

A. The first time I went with Mr. White I was not at the spring. I passed by the spring the second time.

Q. Is it not possible for you to answer a question? When was the first time that you visited the Coyote Spring?

A. In 1879.

Q. How many times have you visited the spring since 1879?

A. I did not visit the spring afterwards.

Q. You never have been to the Coyote Spring but once then?

A. Only once.

Q. You stated in your direct examination that you saw no evidences of habitations or ruins in the neighborhood of Ojo del Coyote?

A. When I went through there the first time I did not see anything.

Q. Did you ever go through there the second time?

A. Yes, sir.

Q. Didn't you state just now you never visited the spring but once?

A. Only one time. The first time I heard it spoken of——

Q. I am asking you about being actually on the ground, at the Ojo Coyote, where you could see the spring—I am not asking you what you heard about the spring.

A. I have never been at the spring, except to go through.

Q. And then only once?

A. Two times. One time I passed with a man coming from the Arroyo Galisteo, and the time I was with Mr. White I heard an old man speak about the Ojo Coyote.

Q. The second time did you see the spring—did you actually see the spring on two occasions?

A. I passed through there.

Q. Did you stop at the spring on those two occasions?

A. I did not stop at the spring neither time.

Q. You merely passed through there?

A. Only passed through.

Q. As I understand you then you have only seen Coyote Spring twice?

172 A. Yes, sir.

Q. And on those two occasions you merely passed through there and went by the spring, by the trail or wagon road without stopping at the spring?

A. Yes, sir. I went there with a wagon to sell fruit.

Q. And you were able to cross the arroyo at the spring with a wagon and horses?

A. There was a road there.

Q. That passes right by the spring as I understand you?

A. I crossed the Coyote and went to the San Marcos.

Q. How near is that road to the spring?

A. Which road?

Q. The road you have just spoken of?

A. That connects with the road that goes from here to Los Placers.

Q. How near is the road that you travelled there when you passed that spring, from the spring?

A. I crossed the Arroyo Coyote and the Ojo Coyote is above.

Q. How far from the spring?

A. It is near.

Q. Is it fifty feet away from the spring?

A. I could not tell you exactly how many feet or how many yards. I only saw it as I passed by.

Q. But the road is near enough to the spring for you to see the spring as you were passing by?

A. I saw water running in the arroyo and I believe it was from the Coyote Spring.

Q. You believe it was from Coyote Spring? Do you know it was the Coyote Spring?

A. I cannot tell exactly whether it is the Coyote Spring. It may have had another name at some time, but that is the name I heard it spoken of.

Q. Then the fact is that you don't know where the Ojo Coyote is?

A. That is the one I have heard called Ojo Coyote.

Q. Did you get out of the wagon on the two occasions when you passed by to get a drink of water?

A. One time I passed driving a "burro," and the other time I passed driving a wagon.

Q. I asked you if you stopped at the spring to get a drink of water?

173 A. No, sir, I just went right through.

Q. You testified that you did not see any ruins at that spring?

A. I did not see any ruins.

Q. Did you make any search for any ruins?

A. I did not have to look for them. That wasn't my business.

MICHAEL O'NEIL, recalled.

Direct examination by Mr. REYNOLDS:

Q. You have testified as to your familiarity with the mining claims involved in this suit, the Morning Star, the Muniz, the Gem, the Sky Blue, and the Castillian?

A. Yes, sir.

Q. Were you acquainted with the Castillian mining claim in the year 1885?

A. I was.

Q. I will ask you whether or not at that time there was any monuments on that mining claim?

A. Yes, the claim was monumented.

Q. How many monuments and where?

A. There were eight monuments—what it takes to stake out a regular mining claim.

Q. At what points on the claim were those monuments?

A. Three on the northeast end, and one on the middle in the west; three on the south end, and one on the east side, and the location post at the discovery shaft.

Q. How were the monuments located with reference to the corner of the claim?

A. One set at the north end corner; west side stake, southwest corner south end center southeast corner, east side center.

Q. Do you know whether or not there was any location notice posted up on that claim at any time?

A. Yes, sir.

Q. Did you see that in 1885?

A. I did. Yes, sir.

Q. Now as to the Muniz claim—what do you know about monuments on that claim?

A. I saw them when it was located.

Q. Was it monumented?

A. Yes, sir.

174 Q. In what way?

A. By putting up eight posts around the claim, the same as I have already testified about the other claims—staking it out and putting in eight monuments—that is what constitutes surveying a claim out—the way we speak of among miners.

Q. Now take the other three mining claims I have mentioned. What was the condition of those claims, when you saw them, as to whether there were monuments on them?

A. There were also monuments on them.

Q. In the same way you have already described as to the other claims?

A. Yes, sir.

Q. And with the location notices?

A. Yes, sir.

Q. Do you know whether or not those monuments on those various claims are still in existence, still standing?

A. Yes, sir. When I was doing my annual assessment last fall I saw them.

Q. What character of monuments were they?

A. They were piles of stones, some standing about that high (indicating two feet) and some a foot high and some higher.

Q. Were you at any time present at a meeting of the miners of Cerrillos Mining District when rules for that district were adopted?

A. I was at the meeting.

Q. When was that?

A. The 28th of March, 1879.

Q. Was there rules adopted at that meeting for the rules of miners in that district?

A. Yes, sir.

Q. Were those rules in writing?

A. Yes, sir.

Q. Who was the recorder, who had charge of the records?

A. Well, there has been a number of them since that time.

Q. Who was the last one that you know of?

A. Harvey Beckwith.

Q. Is he living or dead?

A. He is dead.

Q. Do you know where those records are now?

A. I believe they are in the recorder's office—if not—I
175 don't know where they are.

Q. I will ask you to state what your recollection is as to those rules.

Mr. CLANCY: We object on the ground their absence and loss is not sufficiently accounted for.

The COURT:

Q. Were you ever recorder there?

A. No, sir. Judge Laughlin was recorder there five years, when he lived there.

The COURT: I think I will let it in subject to proof by Judge Laughlin.

Mr. CLANCY: I will admit that Judge Laughlin was recorder there and that he cannot find the rules. I don't care to have him brought here.

The COURT: I think I will admit the testimony.

Exception reserved by plaintiff's counsel.

Mr. DAVIS: I would not put this evidence in, but it was plead in the answer that we had complied with the rules of the Cerrillos Mining District, and that is denied in the reply.

The COURT: You may proceed.

Mr. DAVIS to Witness:

Q. I will ask you to state in what respect, if any, these rules differ from the regulations laid down by the statutes of the United States?

A. Why here were three points that were about all that was of any note to the miners different from the United States mining laws, and the first was that they were to create a district down there for recording claims, for the convenience of the miners,—(secondly) In the monumenting of a claim it was cut down from 90 days to 10 days, as it is in the United States mining laws as I understand it, and thirdly, the first ten feet, the hole had to be sunk within 90 days, and then another point, the surface ground on the side was 600 feet in the United States statutes, it was cut down from 600 feet to 300 feet, making 150 feet on each side of the center line, and the length was the same in the district as in the United States law, namely, 1500 feet.

Q. You have already testified you were present at the time the Castillian and Muniz mine- were located, I will ask you whether or not to your knowledge the locators complied with the rules of that district as you have testified to, with regard to monumenting their claims, and doing what labor had to be done on them?

A. Yes, as far as I know they did.

176 Q. On each of them?

A. Yes, sir.

Q. Now in 1879 when you first went to that vicinity, what was the condition of the country just south of the place where these mines were located, as to whether or not there was a public road there?

A. No, there was no road there. There was a road afterwards made to the old mining camp known as Carbonateville on the south of the Old Turquoise mine. We used to haul water from the Spring of Bonanza to the mining camp of Carbonateville.

Q. When was that road built?

A. It was first used in the year 1879. It was just run from the Mesa, that is all the building there was to it.

Q. When did it first become defined as a road, become marked on the surface of the ground?

A. From 1879 on I would say.

Q. Prior to 1879, how far south of these Turquoise mines was the first road?

A. About 1000 feet.

Q. Is that the road that you have been speaking of?

A. Yes, sir, the Carbonateville camp was a dry camp and they had to haul their water from Bonanza.

Q. What was the condition at that time of the country to the east of the place where these Turquoise mines are now, as to whether or not there was a road?

A. There was an old road there to the east. It ran more to the east. It was called the old stage road.

Q. How far east of the mines was that?

A. It was north of the hills, probably 1000 or 1500 feet.

Q. And where did that road go?

A. Went up the Pecos and the Las Vegas country.

Q. Where did it go in the other direction?

A. To Albuquerque.

Q. Do you know a road that runs from Cienega to Galisteo at that time?

A. They traveled on this road a part of the time and branched off running south. I have seen an old road there. It is not much of a road, but there had been some travel over it when I come to that section of the country.

Cross-examination by H. S. CLANCY:

Q. What road is this you refer to as the stage road?

177 A. The road that is north of the old ruins of the Turquoise Hill.

Q. Don't you mean east of the Turquoise Hill?

A. Yes, I mean east—I am turned around. I mean to the east of the hills.

The COURT:

Q. When you said north, you were mistaken?

A. Yes, it was a mistake on my part.

Mr. CLANCY:

Q. Where does this stage road lead to and from what point?

A. It crosses the Mesa, wher- it goes to I don't know—they claim it runs to the Pecos.

Q. Did you ever travel the road?

A. I traveled it up to the Santa Fe Mountains for timber.

Q. Then the road does run towards the east, does it not?

A. I cannot say whether it runs exactly towards the east, but it runs in that neighborhood—may be northeast or east.

Q. I mean the road generally would be east and west?

A. As near as I can judge it is in that neighborhood. I never had a compass along.

Q. At what point did you strike this road in traveling to the mountains for wood?

A. It is right north of the hills where my camp was.

Q. Say how far from the hills to that road was it?

A. About 1000 or 1500 feet.

Q. And at the point where you strike that road, where does the road go from that point west?

A. Through Bonanza.

Q. And now leaving Bonanza and traveling east, how far did you travel on that road?

A. I went to the mountains up here.

Q. Is that not known as the old road that goes from Cerrillos to Pecos? You said a moment ago you understood this was the road that went to the Pecos?

A. Yes, sir, I understood so—but I don't know whether you mean the town of Cerrillos.

Q. From Bonanza. Cerrillos is the old name for it.

A. Then that is right.

Q. Is it not true it first became known as Bonanza in 1879 or 1880?

A. That is about the time.

Mr. REYNOLDS: I would suggest to the counsel and to the court, that I do not know whether to offer the pleadings in the case of Sena vs. The United States, and the American Turquoise Company, and McNulty and others, for confirmation of this grant—and the answer—so as to show the issues in that case. My desire being to show that Mr. Sena is the same party who is party plaintiff in that case, and that The American Turquoise Company and McNulty are the same defendants.

Mr. CLANCY: I think they might be put into the record—they are not long.

Mr. REYNOLDS: Then I offer in evidence, the amended petition

of Mr. Sena, filed in the court of private land claims, and the answer of the United States. The answer of The American Turquoise Company, and the final decree of the court. That will fix the issues. The point I am after is to lay the foundation for the offering of the deposition of Nasario Gonzales, and Jesus Narvais.

Mr. CLANCY: I have no objection to that, but when you come to offer the deposition of Mr. Gonzales and Jesus Narvais, that is another matter.

The pleadings referred to were marked Defendant's Exhibit No. 64.

In the Court of Private Land Claims.

To the Honorable Court of Private Land Claims and the Chief Justice and Associate Justices thereof:

Your petitioner, Mariano F. Sena, resident of the City of Santa Fe, in the Territory of New Mexico, represents that he is the owner of that certain grant and tract of land lying and being situate in the county of Santa Fe, in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant," and bounded and described as follows, to-wit:

On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas, and on the north by the lands of Captain Sebastian de Vargas.

Said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamante on the twenty-fifth day of May, in the year of our Lord 1728, and the grant papers for the same are in form of an absolute and perfect grant; the original papers of which said grant are now on file in the office of the Surveyor General of the Territory of New Mexico, and are not in the power, possession or control of
179 your petitioner, said original papers being identified as Archive 441.

Said land has never been officially surveyed and your petitioner does not know the area thereof, but he has filed with his original petition herein a sketch map of the same, showing approximately the shape of said land and its location as far as possible; but the exact area and location and shape cannot be stated or ascertained until a survey thereof shall be made.

Your petitioner claims said land by conveyance from the heirs and assigns of the original grantee.

Your petitioner states that since the filing of his original petition herein, he has been informed that the owners of Los Cerrillos Grant, the same being a confirmed grant and numbered seventy-eight of the docket of this court, J. P. McNulty, L. Bradford Prince, Thomas Whalen, Samuel Brommagen, Thomas Moore, Jr., Diego Mares, Bernard Carrol, Otto Ziegler, Albert Geyer, M. J. O'Neill, Julian Padia, Pedro Muniz and The American Turquoise Company claim adverse possession to real estate included within the said Jose de Leyba grant otherwise than by the lease or permission of your pe-

tioner, and he therefore makes said parties and company parties defendant to this amended petition, and asks that proper process issue for service on them.

Said claim to said land has not been confirmed nor has it been considered or acted upon by Congress or any other authorities constituted or acted upon by Congress or any other authorities constituted by law for the adjustment of land titles in the limits of said Territory of New Mexico as acquired.

Your petitioner therefore prays that the validity of such title and claim and of said grant may be inquired into and decided by this Honorable Court and the same confirmed to your petitioner and the other heirs and assigns of said original grantee, and that he may have such other and further relief as the nature of the case requires and to your Honors may appear meet and proper.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Petitioner.

180 In the U. S. Court of Private Land Claims for the District of New Mexico.

General No. 278.

MARIANO F. SENA

vs.

THE UNITED STATES, THE AMERICAN TURQUOISE COMPANY, and
J. P. McNULTY et al.

Now comes the above named defendants, The American Turquoise Company and J. P. McNulty by Edward L. Bartlett, their attorney, and for their answer to the petition of the plaintiff filed herein deny that the said petitioner Mariano F. Sena is the owner of that certain land grant and tract lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant" by the boundaries therein set out.

They deny that said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo Bustamante on the 25th day of May, in the year A. D. 1728, or at any other time. And they deny that the granting papers for the same are in the form of an absolute and perfect grant.

And said defendants deny that said land has never been officially surveyed, but state the fact to be that a very large portion if not all of said described land has been officially surveyed under the direction of the United States as public land of the United States under the direction of the Surveyor General of New Mexico, and for twenty years last past has been recognized by the United States and in its land office as such public land.

And said defendants deny that they claim adverse possession to real estate included within the said Jose de Leyba grant, otherwise than by the lease or permission of said petitioner, but they state to

the court that they are now and have been for many years last past in the actual, exclusive, open and notorious possession of five mining claims with a superficial area of about one hundred acres of land in the southern part of Santa Fe county just north of "Los Cerrillos" confirmed grant referred to in plaintiff's petition; that they have continuously worked and operated said mining claims which are located under the mining laws of the United States and the Territory of New Mexico and the rules and regulations of the United States in said Territory, and have the final receipt for a patent to one of said mining claims, under proceedings to obtain a
181 patent therefor; that they have paid the taxes levied and assessed against the said property, and that they and their grantees have enjoyed the exclusive, undisturbed and quiet possession of the same for more than ten years last past.

Said defendants therefore pray that the proof of the denials and allegations contained in this their answer may be inquired of by the court.

THE AMERICAN TURQUOISE COMPANY,
AND J. P. McNULTY,
By EDWARD L. BARLETT, *Their Attorney.*

UNITED STATES OF AMERICA, *ss.*

No. 278.

In the Court of Private Land Claims, Santa Fe District.

MARIANO F. SENA, Complainant,
vs.
UNITED STATES, Defendant.

Jose de Leyba Grant.

Now comes the United States by its attorney, Matt G. Reynolds, and for answer to the petition and amended petition filed in the above entitled cause, says:

That it is not true, as alleged in said petition, that plaintiff is the owner of that certain tract of land described in said petition, or any part thereof.

That it is not true that the tract of land described in the said petition was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo Bustamante, on the 25th day of May, A. D. 1728; and it is not true that the granting papers for the same set forth and described in plaintiff's petition, are in the form of and constitute an absolute and perfect grant.

Defendants admits that said land has never been officially surveyed and denies that such sketch map filed by the petitioner, correctly shows the shape of said land and its location, but on the contrary alleges that if any grant was ever made as alleged in plaintiff's petition and amended petition, the same was located in a manner very different from that set forth in said sketch map, and cov-

ered no portion of the premises indicated in said petition and sketch map.

Defendant further shows that said petition was not filed within two years from March 3rd, 1891, as provided by the act establishing the Court of Private Land Claims, and the claim mentioned in said petition consequently became and was abandoned and forever barred at the expiration of two years. Defendant pleads said limitation in bar of the claim herein presented.

That as to the several other matters and things alleged in said petition, defendant has not knowledge or information to enable it to form a belief as to the truth thereof, and it accordingly denies each and all of said allegations and prays that complainant be put to the proof of the same, as is provided by the act establishing this court.

And this defendant, further answering, denies that the complainant is entitled to the relief or any part thereof in said petition alleged and prayed for, and prays the same advantage of this answer as if it had pleaded or demurred to said petition.

Now having fully answered, it prays the court that a decree may be entered rejecting the claim of said alleged grant and dismissing the petition, and for such other orders as to the court shall seem meet and proper and which it may be authorized to make in the premises.

MATT G. REYNOLDS,
U. S. Attorney, C. P. L. C.

In the U. S. Court of Private Land Claims, Santa Fe, New Mexico,
April Term, 1900.

No. 278.

MARIANO F. SENA
VS.
UNITED STATES.

Jose de Leyba Grant.

The title papers and documents produced from the archives of the Surveyor General's Office and received in evidence in this case show that the grant in question was made to Jose de Leyba by the Governor and Captain General Bustamante, in the name of the King of Spain in the year 1728, and that possession was formally given to the grantee of the land petitioned for and granted.

The evidence as to settlement and occupation of the tract purported to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of its existence in the community by the oldest inhabitants now living, is so vague, contradictory, and uncertain as to be almost wholly wanting.

The question of boundaries of the tract claimed was one of serious contention upon the hearing of the case, involving as it does the

patent titles and other conflicting interests of adverse claimants to lands embraced within the boundaries claimed under the grant title.

183 Upon consideration of the state of facts presented, the court has reached the conclusion which may be briefly stated. The first question arising is, What is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant, and therefore could be brought into this court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700, unless already confirmed by Royal order of the King or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is not evidence in this case, either by the documents or otherwise, that this requirement of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any ground that will justify a presumption of such compliance with the requirement for such confirmation. It therefore follows that this grant must be held to be not a perfect, but an imperfect grant. And as such imperfect grant, it is subject to the provision of the act creating this court, requiring the petition for confirmation herein to be filed within two years, but since this case was not brought or filed in this court until the present year, we must hold that it is barred by the statute of limitations, and hence must dismiss the case for want of jurisdiction under the said statute.

WILBUR F. STONE,
Associate Justice.

Mr. REYNOLDS: I now offer in evidence the notice in that case of Sena vs. The United States, The American Turquoise Company and J. P. McNulty, the application and notice. The notice to counsel for Mr. Sena to take the deposition before the Hon. Edward F. Stone, one of the associate justices of the court of private land claims, of Nasario Gonzales, Francisco Romero, Francisco Bustamante, Antonio Bustamante, Jesus Narvais, Jose Duran, or Benavidez, and Eligio Sedillo, signed by the United States attorney for the government, and Edward L. Bartlett, counsel for J. P. McNulty, and The American Turquoise Company. That notice contains an affidavit of Francisco Delgado of service of notice upon H. S. Clancy,

one of the counsel for Sena, and there is the application to 184 Judge Stone, signed by the same counsel, for an order to take the testimony in February. The application is signed by Edward L. Bartlett, who appears for The American Turquoise Company and J. P. McNulty. Then follows the order of Wilbur F. Stone, of the court of private land claims, ordering the taking of the testimony on the 23rd of February at ten o'clock a. m., in the Federal building at Santa Fe, New Mexico.

I then offer the testimony taken before the Hon. Wilbur F. Stone, Associate Justice of the Court of Private Land Claims, of Nasario Gonzales, whose death has been shown.

Mr. F. W. CLANCY: I will admit that Jesus Narvais is dead.

Mr. REYNOLDS: I offer in evidence the deposition in that case of Nasario Gonzales and Jesus Narvais.

Mr. CLANCY: The general objection which I will have to make first is, that this is in direct defiance of the ruling of this court upon the demurrers to the replication. The demurrers insisted that the action in the court of private land claims was not for the recovery of this property, or of the same nature or character, or the same parties, and the court sustained that demurrer. My position was on the argument of the demurrer and is now, that this was an action between the same parties, and of the same character, and therefore anything of this kind would be admissible, but the court has ruled exactly opposite in this case, and I am compelled to object on that ground.

Mr. CLANCY: There is a further objection which I desire to make, and that is it is not shown that these depositions were properly admissible in the former suit and in the court of private land claims, because it does not appear from anything that has been put in evidence, that the witnesses were not available, or even in attendance, at the time of the trial in the court of private land claims. What I shall do, if the court requires it, unless counsel will admit it,—I would have to submit evidence to show that these witnesses were in attendance on the court at that time.

Mr. REYNOLDS: Yes, I have no objection to that. They were in the court room, or they were in the city of Santa Fe and could have been reached at any time.

Objection overruled by the court.

Exception reserved by Mr. Clancy, attorney for plaintiff.

Mr. Davis here read to the court and jury, the deposition
185 of Nasario Gonzales, which was marked Defendant's Exhibit No. 65.

Mr. Davis here read to the court and jury the deposition of Jesus Narvais, which was marked Defendant's Exhibit No. 66. Defendant's Exhibit No. 66, which said depositions are as follows:

In the United States Court of Private Land Claims, Santa Fe, New Mexico.

No. 278.

MARIANO F. SENA

vs.

UNITED STATES.

Jose de Leyba Grant.

Depositions taken in the above entitled case in the Federal building on behalf of the Government, Santa Fe, New Mexico, on Friday, February 23rd, 1900, before Hon. Wilbur F. Stone, an associate justice of said court.

Appearances:

Mr. W. H. Pope, assistant United States attorney, appeared for the government.

Mr. Edward L. Bartlett, appeared for The American Turquoise Company.

No counsel appeared for the plaintiff.

NASARIO GONZALES, sworn on the part of the government testified upon direct examination by Mr. Pope, as follows:

Q. State your name, age and residence?

A. My name is Nasario Gonzales; I am 83 years old, I reside in Precinct No. 6, County of Santa Fe, New Mexico.

Q. What is the name of the settlement in which you live?

A. La Cienega.

Q. Where were you born?

A. In Bernalillo.

Q. How long have you lived at La Cienega?

A. Fifty-four years.

Q. You moved from Bernalillo to Cienega, did you?

A. Yes, sir.

Q. And have you lived there ever since?

A. Yes, sir.

Q. Have you a ranch there?

A. Yes, sir.

Q. What has been your business in life since you have lived in Cienega?

A. It has been in various lines; I have been farmer and stock-raiser, and I have been a merchant.

186 Q. Have you ever held any official positions in this county?

A. Yes, sir.

Q. I will get you to state what they were?

A. I have been three terms senator from the county of Santa Fe in the legislature. I have been county commissioner.

Q. Do you know a place called the old pueblo of San Marcos?

A. Yes, sir.

Q. I will get you to state to what extent you are acquainted with the country between San Marcos on the south and Balisteo?

A. Fifty years.

Q. Are you well, or otherwise, acquainted with that section of the country?

A. I am familiar with the land; I have been for 40 years the owner of the grant of the Spring of San Marcos.

Q. And you are acquainted, you said, with the country in between the Spring of San Marcos and your ranch at Cienega?

A. Yes, sir. And I have been the owner of the Spring of San Marcos, of the grant of the Spring of San Marcos.

Q. Do you know the place down there that is now held by the Turquoise Company, Mr. McNulty, and The American Turquoise Company?

A. Yes, sir.

Q. How long have you known that place where the Turquoise mine is now?

A. Ever since the time during the period of fifty and odd years.

Q. Did you ever have occasion to travel over that section of the country much during the said fifty years?

A. Yes, sir.

Q. Have you ever had flocks that you pastured down there during that time?

A. For forty years I have had my ranch at the Spring of San Marcos, and had my cattle and sheep and horses there.

Q. And that country north of San Marcos, around the Turquoise mine; have you ever pastured there around that section?

A. Yes, sir, always; they are at the same place.

Q. Since you have been living down there at Cienega, during these forty or fifty years, have you ever heard in that vicinity of a grant called the Jose de Leyba grant?

A. No, sir.

Q. Have you ever heard anyone down there, or anywhere else, claiming a grant called the Jose de Leyba grant?

A. Never; not of my own knowledge, nor by tradition, have I ever heard about this.

Q. Have you made any inquiry about it at any time?

A. I have seen many title papers, and my father-in-law was a very well informed man, and he never told me about this anything.

Q. During that time that you have lived down there, have anyone ever occupied this land around that Turquoise mine, and between Cienega on the north and San Marcos on the south?

A. No, sir. Nobody has been there outside of the Turquoise mine people; and now, in these last few years, one Pedro Mares and one Thomas made some entries there.

Q. Some entries down here in the United States land office?

A. I think so; they have their houses and they have plowed lands there.

Q. Before these people came, who made these entries, was anyone at any time occupying that land?

A. No, sir; never.

Q. Since you have been down there, from the very earliest time, has anyone ever occupied that land, claiming it under a grant called the Jose de Leyba grant?

A. Never; I have never heard anything about such a person as Jose de Leyba.

Q. Have you ever heard anything of anyone of late around there claiming under a grant made by Jose de Leyba, within the last year or two?

A. No, sir; nothing.

Q. Look at this map, which is a map of the grant attached to the petition, for the land that is claimed in this case.

A. I have very little knowledge about maps.

Q. I will explain the map to you: here is the San Marcos road, on the east of the tract of land that is claimed; here is the Arroyo de la Piedra on the south, and Coyote Springs; here are the lands of the Cerrillos tract, and the Cienega tract on the west; and on the
188 north is the road from the Pecos to Cerrillos. Ask him if he knows all these points that I have named?

A. Yes, sir.

Q. And do you know the land that is included within these points that I have mentioned?

A. Yes, sir.

Q. And are these the lands that you say you have known for fifty or more years?

A. Yes, sir.

Q. And are these the lands on which you say you pastured?

A. Yes, sir. I have said upon the grant of San Marcos, and upon all of that land.

Q. Nobody ever objected to your using it for pasture?

A. No, sir. I used that land with the same freedom as I used my own.

Q. Did other people pasture on it, too?

A. Yes, sir.

Q. Did any of these people that pastured on it, claim it under the Jose de Leyba grant?

A. No, sir.

Q. Did they claim it under any grant?

A. No, sir; it was never known.

Q. Now, when you went to that country, were there any ruins of houses, or any other ruins, within this tract now claimed as the Jose de Leyba grant, with the exception of the pueblo of San Marcos?

A. The pueblo of San Marcos is not on this grant, as they claim it.

Q. That is a separate grant, and it is south of this grant?

A. Yes, sir. I do not know where that tract is that they are claiming under that grant.

Q. I mean where I have shown you in this map here?

A. I understand.

Q. Are there any old ruins now down on this land?

A. There are no other ruins there, except the ruins of some huts

that were built there by Jesus Narvais, who had constructed these huts for the use of his sons who were herding some sheep there.

Q. Do you remember when these huts were built?

A. Yes, sir.

Q. Is Jesus Narvais here today?

189 A. He is coming.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. Where are these old huts with respect to that arroyo?

A. The Arroyo de la Piedra comes this way, and the Arroyo del Coyote comes down and empties into it on the south of the Arroyo de la Piedra; and that Arroyo de la Piedra is within the grant of San Marcos.

Q. That San Marcos grant was presented to the Court of Private Land Claims, was it not?

A. Yes, sir, it is already confirmed.

Q. You were plaintiff in that case, were you not?

A. No, sir. I sold it.

Q. Where were these old huts of Jesus Narvais, with regard to the Arroyo de la Piedra and the Coyote Arroyo, right at the Springs of Coyote?

A. Yes, sir.

Q. How long ago was it, that these huts were built?

A. About more or less, I do not think that they were built for over 20 years, more or less.

Q. Before these were built, were there any ruins of any kind, at or near the Coyote Springs?

A. Nothing.

Q. Were there any ruins of any kind, inside of this tract represented on the map I have shown you?

A. There never have been, and there are none today.

Q. Did you ever hear of an arroyo down there, near the Coyote Springs, or the Arroyo de la Piedra, called the Arroyo del Oregano?

A. I have never heard the name of Oregano Arroyo mentioned.

Q. Have you ever heard of any such Arroyo del Oregano anywhere in that section of the country within miles of the Turquoise mines?

A. No, sir, never.

Q. Did you ever hear of the Cuesta del Oregana de Organo, down in the vicinity of the Turquoise mine, or between the Turquoise mine and San Marcos?

A. No, sir, never; there is nothing; there is not even a slope there; a cuesta I call a place where you go up the slope, but there is no cuesta down there; there is nothing.

190 Q. Did you ever hear of an arroyo called the Arroyo del Cuesta?

A. There is nothing; nothing of that kind down in that section of the country at all; there is nothing.

Q. Did you ever hear down in that section of the country of lands called the lands of Juan Garcia de las Rivas?

A. No, sir.

Q. Did you ever hear of the lands of Cienega, where you live called the lands of Juan Garcia de las Rivas?

A. No, sir. I have numerous papers, very old papers, as far back as the conquest among them, and I did not find a single paper that mentioned any Garcia.

Q. Any Garcia de las Rivas?

A. No, sir.

Q. These papers to which you refer, did they relate to the lands of Cienega?

A. The lands of La Cienega.

Q. Do you know a road from Pecos to Cerrillos, coming south of the lands of Cienega?

A. I know a trail that I have known there ever since I came to that locality, that comes out down above Los Tanques goes to Galisteo, and I have known no other.

Q. Does that road or trail run to the old Mexican settlement of Los Cerrillos, and Bonanza?

A. No, sir. This trail that I am referring to now comes out from the little town of Los Tanques, which is the oldest settlement to the north of the lands of La Cienega.

Q. East of Cienega, where you live, have you ever heard of any lands of Sebastian de Vargas?

A. No, sir. I think they lie here, close to the hills there used to be a grant called Sebastian de Vargas grant.

Q. These lands of Sebastian de Vargas lie east of the Camino del Medio, do they not?

A. East of the Camino del Medio.

Q. Have you ever heard of the lands of Sebastian de Vargas west of that grant?

A. No, sir.

Q. How far is that Camino de en Medio from Cienega?

A. It may be from 12 to 14 miles, more or less.

Q. That is the road from Santa Fe to Galisteo, is it, the Camino de en Medio?

A. Yes, sir. There are two roads, the best traveled road
191 goes below the middle road.

Q. The Camino de en Medio comes from the direction of San Cristobal towards Santa Fe, and comes into the road that goes to Galisteo?

A. It comes into this road going from Santa Fe to Galisteo at the Arroyo Hondo.

Q. Do you know the old road running from Cienega to Galisteo?

A. The only road that has been there is that trail that I have mentioned a while ago. Afterwards I used to have lands at Galisteo and I used to raise considerable crops, and I made a road over that same trail.

Q. And that was the first wagon road from Cienega to Galisteo, was it not?

A. Yes, sir.

Q. How does that road run with respect to the direction in which

the Turquoise mine and Mr. McNulty's mines are located, east or west?

A. To the north; it goes by that hill going to Galisteo.

Q. Does it go to the sunrise or to the sunset from that hill?

A. Towards the sunrise.

Q. Is there any old road from Cienega to Galisteo, west or to the sunset, from the Cerro on which these Turquoise mines are located?

A. There is a road that I made with my own wagon, going to La Baca on the Arroyo Galisteo, and that is the way people call it the road of Nasario Gonzales.

Q. Before you built that road, was there any road there?

A. No, sir. There were trails made by cattle coming for water at Cerrillos.

Q. But the old trail was traveled by people going to Galisteo, was on the east?

A. Yes, sir, very far from it.

Q. Within this tract, the map of which I have shown you, is there any monte?

A. There are very few spruce trees.

Q. There is no timber, or any monte or any woods, to any considerable extent?

A. There are a few spruce trees; there has never been any timber.

Q. Is it or is it not true, that most of that country is a bare, level plain?

192 A. Yes, sir.

Q. Within this tract, as claimed, that I have shown you and a map of it, what water is there?

A. None.

Q. What about this Coyote Spring that you have mentioned?

A. The waters of Coyote Springs are within the grant of San Marcos. The water in the Arroyo de la Piedra is also within the grant of San Marcos.

Q. How much of a spring is the Coyote Spring?

A. Very little water; it comes out from a rock, and gushes out from the rock and makes little pools, and the stock drink it.

Q. Is there enough water there to plant corn?

A. No, sir, nothing.

Q. Is there within this tract any evidences of any land having been cultivated in the past?

A. No, sir.

Q. When you went there, was there any evidence of any land having been planted?

A. No, sir.

Q. Around near this Coyote Spring, or anywhere on this tract?

A. No, sir, nothing.

Q. What is the southern line of the land of the Cienega on the south?

A. The south boundary line is Los Cerrillos.

Q. The grant of Los Cerrillos?

A. Yes, sir. The north boundary line of the grant of Los Cerrillos is the south boundary line of La Cienega.

Q. What natural object is there that divides it?

A. It is a hill, a ridge that washes it towards Cerrillos and towards La Cienega.

Q. Is there any high hill down there?

A. There is a mountain or peak.

Q. The cerro that divides them is right at the center of the divide, as you cross on the top?

A. Yes, sir.

Q. Were there any old people living at Cienega, when you first went there?

A. Ever since the time of the conquest.

Q. Did you ever talk with them about the natural objects
193 around there, and the old grants around there, and things of that kind?

A. Yes, sir. It is natural to talk about everything, and I had friendly relations with all old people there.

Q. And you say you never heard from any of them at any time anything about a grant called the Jose de Leyba grant?

A. Never.

Q. Did you ever hear from them anything as to the Sitio of the Cienega tract?

A. Yes, sir.

Q. Who did you understand that sitio was given to?

A. From some of the old title papers, it appears that the title to the land was granted to Puan Pais Hurtado, and from this Juan Pais Hurtado it was transferred to Manuel Tenorio de Alva.

Q. Did you ever hear anything about Juan Garcia de las Rivas ever having anything to do with the sitio de Cienega?

A. I never heard that said, and there is no papers that shows that fact.

Q. Do you know anything about an old will in connection with this Cienega tract?

A. Yes, sir, I know. Manuel Tenorio de Alva's will. I have it myself.

Q. Have you it here?

A. No, sir. I did not know to have it here.

Q. Is it registered in the probate clerk's office of this county?

A. I believe it is.

Q. I will get you to state whether it is possible to cultivate any portion of the land included within this tract, the map of which I have shown you, attached to plaintiff's petition in this case.

Q. Yes, sir. It is possible, but without water.

Q. You have to depend on rains?

A. Yes, sir.

JESUS NARVAIS, sworn on the part of the government, testified upon direct examination by Mr. POPE as follows:

Q. State your name, age and residence?

A. My name is Jesus Narvais; I was born in 1819.

Q. Where were you born?

A. I was born in Cochiti.

Q. Where do you live now?

194 A. At La Cienega.

Q. How long have you lived at La Cienega?

A. For many years; that is, almost all my life.

Q. How old were you when you went there to live?

A. I was ten years old. My mother had been born at that place, and my grandfather.

Q. Did you know that place La Cienega before you went there to live?

A. Yes, sir, my mother used to be from that place, but my mother had been married to a man who had been brought up by a Spanish priest.

Q. Have you lived any at Pino's ranch?

A. Yes, sir.

Q. How far is that from Don Nasario Gonzales' house, the witness who has just testified?

A. About a mile.

Q. That is in what is called La Cienega, is it?

A. Yes, sir.

Q. What has been your occupation in life?

A. A farmer. At the present time I have no occupation, because I am very old.

Q. Have you ever been engaged in stock raising?

A. Yes, sir. My own, some few cows.

Q. Do you know where the pueblo of San Marcos is?

A. Yes, sir.

Q. Do you know where the road of San Marcos is?

A. I do not know which road that is, but I know the old road that comes from the side of these little hills.

Q. The old road from Santa Fe to San Marcos, on the east from the Turquoise mine?

A. I do not know which one the old road was. I know this road, because there is no other road.

Q. Do you know where the American Turquoise mine and Mr. McNulty's mine are located?

A. Yes, sir.

Q. Is that the place called Cerro Palado?

A. Yes, sir.

Q. Do you know where the old road from Cienega to Galisteo ran, when you first went to that country?

A. I think it is the road that comes there to the other side of the hill; that old road that goes to the other side of the hill.

195 Q. Does it run to the sunrise side or the sunset side of this Cerro Pelado on which Mr. McNulty's mines are located?

A. Towards the sun rise.

Q. Is there a road running there now, from La Cienega to Galisteo on the west side of that hill?

A. Yes, sir.

Q. Who built that road?

A. I believe Don Nasario Gonzales did.

Q. Was there any old road there on that side, prior to that time?

A. There was another road a little further to the north; I think there was an old road.

Q. Where did that go to, and from where?

A. To Galisteo from La Cienega.

Q. Can you read and write?

A. No, sir. I never had any opportunity to learn how to read or write.

Q. Are you acquainted with the section of country around northwest from the pueblo of San Marcos, and the Arroyo de la Piedra, for six or seven miles?

A. I know that land.

Q. How long have you known them?

A. About 20 or 25 years that I have known it well.

Q. Did you ever pasture on these lands?

A. Yes, sir. I was there; I used to have my little children there at the place called Ojo Spring.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. Are there any ruins of houses, or any ruins of any kind on that land?

A. I never knew ruins of any kind; a little above the spring on a little hill I myself constructed a very small hut there, for my sons.

Q. Is that in ruins now?

A. I think it is there yet. I have not been there since.

Q. Were there any ruins of houses, or anything to show that houses had ever been around in the neighborhood of Coyote Springs, before you built?

A. No, sir, I do not think anybody would have considered it, because it is not a land for cultivation, for farming.

Q. Why is it not a land for cultivation?

A. Because it is a very hilly, unless it is a little above the 196 spring at Coyote, towards the little valley where Mr. Thomas has a ranch, and also a son-in-law of mine, Diego Mares.

Q. What about water; is there any water there?

A. They have a well. They made a well. Thomas made one and my son-in-law made two wells.

Q. Outside of the wells, is there any water there for cultivation?

A. Outside of the wells there is no water, with the exception of the little spring of Coyote.

Q. How much, if any, can be cultivated from the water of the Coyote Spring?

A. Nothing; there is scarcely enough for the stock.

Q. What about timber around there, on this tract, from the Coyote Spring, north, and around there?

A. There is only scrubby bushes and these sage bushes, and a few spruce trees.

Q. Most of the country is bare, is it not?

A. Yes, sir. A plain, almost all of it.

Q. Since you have been living there, have you ever heard of a grant in that vicinity from the Coyote Spring north to the Turquoise

Mine, and up towards Cienega and Pino's ranch, called the Jose de Leyba grant?

A. I have not known it; very recently I heard statements to that effect, but very little of it.

Q. Did you ever hear anyone claiming land down there as the Jose de Leyba grant?

A. No, sir.

Q. At any time?

A. No, sir, never at no time.

Q. When you went there, was anybody occupying that land?

A. No, sir.

Q. When you pastured on that land, did anyone ever object to your using it for pasturage, claiming it as the Jose de Leyba grant?

A. Nobody. I had not heard that name mentioned until very recently.

Q. Did anyone else pasture on that land besides yourself?

A. Yes, sir; several persons.

Q. Who did?

A. Don Nasario Gonzales, and his brothers-inlaw, Don Jose Baca and Don Manuel Baca, and various other persons.

197 Q. Did they claim the land?

A. No, sir.

Q. It was common pasturage ground, was it, or not?

A. It was so recognized; it was so called.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. You have been to the San Marcos Spring, have you, a number of times?

A. Yes, sir.

Q. And to Galisteo?

A. Yes, sir.

Q. You say you live at Coyote Spring?

A. Yes, sir. That is, I had my herd of cattle there, or cows; I do not live there; I was there during the summer.

Q. Do you know an arroyo that is called the Arroyo del Coyote?

A. Yes, sir.

Q. Now, have you ever heard of an arroyo called the Arroyo del Oregano?

A. No, sir.

Q. Or of a cuesta called the Cuesta de Oregano?

A. I never heard that name.

Q. Or an arroyo called the Arroyo of the Cuesta del Oregano?

A. Neither.

Q. Did you ever talk with the old people when you first went to that country, about the lands, or about the natural objects?

A. No, sir.

Q. Did you at any time ever hear the old people speak of the place called the Cuesta de Oregano?

A. I have not even heard that name.

Q. Did you ever hear of the lands of Juan Garcia de las Rivas in that vicinity?

A. No, sir.

Q. At or near La Cienega, did you ever hear of any such man?

A. No, sir.

Q. Did you ever hear it said that the lands of Cienega were the lands of Juan Garcia de las Rivas?

A. They might have been, but I was not informed as to that.

198 Q. Did you ever hear of the lands of Sebastian de Vargas down there near the lands of Cienega?

A. Yes, sir. I heard about this.

Q. Where are they?

A. They are at La Cienega.

Q. In the sitio of La Cienega?

A. I think so.

Q. Did you ever hear of any lands of Sebastian de Vargas east of the sitio of La Cienega?

A. Yes, sir. I do not understand very much about these matters.

Q. Do you know where these lands are?

A. They used to say that they are at Los Alamos, or at La Cienega, I think is what I am informed.

Q. Los Alamos is at the ranch of Mr. Lamy, is it not?

A. Yes, sir.

Q. Do you know an arroyo called the Arroyo Gallinas?

A. Yes, sir.

Q. The Canada de Galisteo, is that the same as the Arroyo de la Piedra?

A. Yes, sir.

Q. Do you know how far the lands of the Cienega extend east?

A. No, sir, I am not informed as to that.

Q. Did you ever hear from the old people anything about Don Francisco Baca y Torres?

A. Yes, sir, he used to talk about the lands. But I did not have very much conversation with him.

Q. You have no recollection of his having stated about the lands of the Cienega extending east of the Camino de en Medio?

A. I only knew that middle road coming from the place called Las Bocas.

Mr. REYNOLDS: We desire now to offer in evidence, the petition and the grant papers and decree. The plat under the decree of confirmation—the approved plat of the Los Cerrillos Grant.

The object and purpose of that is to show that this Los Cerrillos grant, the patented portion under confirmation by the court of private land claims, traces the south line somewhat north of the original claimed line at the time it was filed in the surveyor general's office, under the act of 1854.

199 Mr. CLANCY: I think it is immaterial, but I don't know as I have any objection to it.

The documents offered were here marked Defendant's Exhibit No. 67.

In the Court of Private Land Claims, Sitting in the Territory of New Mexico, at the City of Santa Fe.

BEATRIZ PEREA DE ARMIJO

vs.

UNITED STATES.

To the honorable chief justice and associate justices of the Court of Private Land Claims.

Your petitioner, Beatriz Perea de Armijo, a resident of the county of Bernalillo, in the Territory of New Mexico, respectfully shows to the court:

1. In the year 1788 Jose Miguel de la Pena presented a petition to Fernando de la Concha, then civil and military governor of the province of New Mexico, setting forth that he had registered a piece of land situate in the place called Los Cerrillos, which belonged to Alonzo Rael de Aguilar, the grandfather of his wife, Maria Rael, and that it had been abandoned for many years and that said Alonzo had lost the right which he had had, and the said Pena therefore asked of the governor that said land be given to him for himself, his children and heirs. On the 20th of April, 1788, the said governor certified that he had visited the tract of land and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof and directed that the proper documents should be made in his favor by the chief alcalde of Santa Fe, Antonio Jose Ortiz. On the 12th day of June, 1788, Antonio Jose Ortiz, chief alcalde of Santa Fe, in obedience to the order aforesaid of the governor, proceeded to the land in question and notwithstanding that the petitioner had been placed in possession by the governor, he proceeded to deliver formal juridical possession of the land to the said Jose Miguel de la Pena, and designated the boundaries of the tract, which were, on the north, the boundaries of the Canada de Guicu and lands of the Bacas; on the south, the high hills; on the east, the road which goes to Galisteo, and declared that said tract measured from east to west, 2500 varas, and was divided in three parts, one of which was assigned to the said Jose Miguel de la Pena, on the western side, adjoining the land of Cleto Miera, and on the east adjoining the lands of the heirs of Antonia Teresa Rael de Aguilar; all of which proceedings by said alcalde appear in the act of juridical possession, duly signed by him. The said petition of Jose Miguel de la Pena, the certificate of the governor and the act of juridical possession are on file in the office of the surveyor general of New Mexico, reported No. 59, but copies and translations thereof in duplicate are filed herewith and are hereby made a part of this petition.

2. The lands embraced within the boundaries hereinbefore referred to, have been, as your petitioner is informed and believes, in the possession of the heirs and legal representatives of the Jose Miguel de la Pena from the time of the making of said grant in 1788, down to the present time, and there are no persons now in

possession of the same or any part thereof, otherwise than by the lease or permission of your petitioner, but your petitioner is informed and believes that John Gwyn and Robert B. Willison, both residents of said county of Santa Fe in the Territory of New Mexico, make claim to a part of said land. It appears from the records of the office of the surveyor general that said Gwyn and Willison were making said claim more than twenty years ago, but they have not been in possession of any portion of said land under said claim, and your petitioner charges that if they ever had any right to any portion of said land, which he denies, it has been forever lost and barred by the operation of the statute of limitation.

A claim of said grant was submitted to the surveyor general for New Mexico in the year 1871, and that officer on the 31st of January, 1872, made his report thereon, and recommended the same to congress for confirmation, but the said claim has never been acted upon by congress.

The said land is situate in the county of Santa Fe and its boundaries are as set forth in the first paragraph of this petition. The quantity of land contained therein according to a survey thereof made under the direction of the surveyor general for New Mexico is 2284.41 acres, and a map thereof showing the same is filed herewith in accordance with the requirements of the statute. This petitioner avers that the title to said land hereinbefore set out was complete and perfect at the date when the United States acquired sovereignty over the country embraced within the present Territory of New Mexico, and she is the legal successor in interest in part of the rights of the original grantee.

Your petitioner therefore prays that the validity of such
201 title and claim may be inquired into and decided by this court in accordance with the provisions of the statute of the United States.

BEATRIZ PEREA DE ARMIJO,

Petitioner.

F. W. CLANCY, *Solicitor for Petitioner.*

Translation Title Papers in Case 78.

(Seal) Six Reals; second seal; six reals; years, seventeen hundred and eighty-eight and eighty-nine.

His excellency the Governor and Captain-General:

I, Jose Miguel de la Pena, a resident of the city of Santa Fe appear before your excellency in due legal form, and represent:

Sir, I have registered a piece of land situate in the place called Los Cerrillos, which said place or tract belonged, when this province was recently conquered, to Alonzo Rael de Aguilar, my wife Maria Rael's grandfather, and it having been abandoned for so many years, and said Don Alonzo having lost the right he had to it; now, sir, I ask Your Excellency for the same, in the name of His Majesty, with all its entrances, and exits, pastures and watering places, uses and customs, for me, my children, heirs, or the person or persons to me useful and of my will, to enable to plant and also to keep what

animals God may be pleased to give me, and I promise to settle said tract according to His Majesty's will and to what he commands in his royal ordinances. Wherefore, and in consideration of all else in my favor, I ask and pray Your Excellency, with the utmost submission, that you be pleased to hear me and grant to me in the name of His Majesty what I hope to obtain through your great righteousness, and your exact and sure distribution of justice, so that through this you may provide as to Your Excellency may seem proper. I implore Your Excellency's royal aid, and declare in due form that this my petition is not made in dissimulation, and as may be necessary, etc.

JOSE MIGUEL DE LA PENA.

Santa Fe, 20th April, 1788.

Finding expedient the cultivation of the land referred to in this petition, I visited the tract cited, and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof, and
202 that it may be known in all time the proper documents will be duly made in his favor, by the chief alcalde of this city, Jose Antonio Ortiz.

CONCHA.

In this city of Santa Fe, on the 12th day of the month of June, of this year seventeen hundred and eighty-eight, I, captain of militia and chief alcalde of this city, in virtue of the preceding order and decree of His Excellency, Fernando de la Concha, lieutenant colonel and civil military governor of this province, proceeded to the place and location commonly called Los Serrillos, and notwithstanding that the petitioner had been placed in possession by said lieutenant colonel, I took by the hand the said Jose Miguel de la Pena and led him over the tract. He plucked up grass, cast stones and shouted saying, "Live our Lord, the King, whom may God preserve," taking quiet and peaceable possession of the said lands without any objection, I designating the boundaries, which are on the north, the boundaries of the Canada del Guyeu and lands of the Bacas, on the south, the hills, on the east the road which leads to Galisteo, and said tract embraces by measurement from east to west 2,500 varas; and the said tract being divided in three parts, to the said Miguel de la Pena were assigned 833 varas, on the western side adjoining the lands of Cleto Miera, and on the east adjoining lands of the heirs of Antonio Teresa Rael de Aguilar, and on the other side the same boundaries as are stated in the preceding grant, I notifying him that the pastures and watering places are common. And that it may so appear in all time, I signed this as special justice, with my two attending witnesses, on account of the notorious lack of a public and royal notary, there being none of any kind in this province; to all of which I certify.

ANTONIO JOSE ORTIZ.

ANTO. JOSE ORTIZ.
JOSE MIGUEL ORTIZ.

In this city of Santa Fe on the 18th day of the month of February of the year seventeen hundred and ninety-one, before me Antonio Jose Ortiz, captain of militia and chief alcalde of this said city, appeared the above-mentioned Jose Miguel de la Pena, in whose favor the two documents that appear were executed, and declared that, with the consent of his children and of his wife, he would convey and did convey, to Cleto de Miera y Pacheco, the right, title and

205 domicile which he had acquired to the tract called Los Serillos, as appears by the above documents executed in his favor, which he declared he conveyed with all the title necessary to the said Cleto Miera, the latter having paid him \$450 in the currency of the country, which money the said Jose Miguel de la Pena declared he had received to his satisfaction and content, with which amount he acknowledged himself satisfied, content and paid; and if in the future it should become of greater value, he gives and donates the whole, pure, entire, perfect, and irrevocable, termed in law *inter vivos*, and that he may control and use the same at his pleasure; and he the said Pena, declared that he renounces all and every of the laws, requirements and circumstances which provide in his favor, and he requested me, that as chief alcalde. I interpose my sanction and judicial decree, and I, said chief alcalde, declared that I would, and I do interpose the same as fully as I am authorized by law; and that it may so appear, the said Pena signed with me to all of which I certify.

ANTONIO JOSE ORTIZ.
JOSE MIGUEL DE LA PENA.

(Here follow maps marked pp. 203 & 204.)

T15NR8E

Sec 6

Sec 5

Sec 4

Lands of the Bacoas
Carrada de Guibby



Sec 7

Sec 9

Sec 10

Sec 17

LOS CERRILLOS
GRANT

Sec 16

Area 197881 Acres

Sec 20

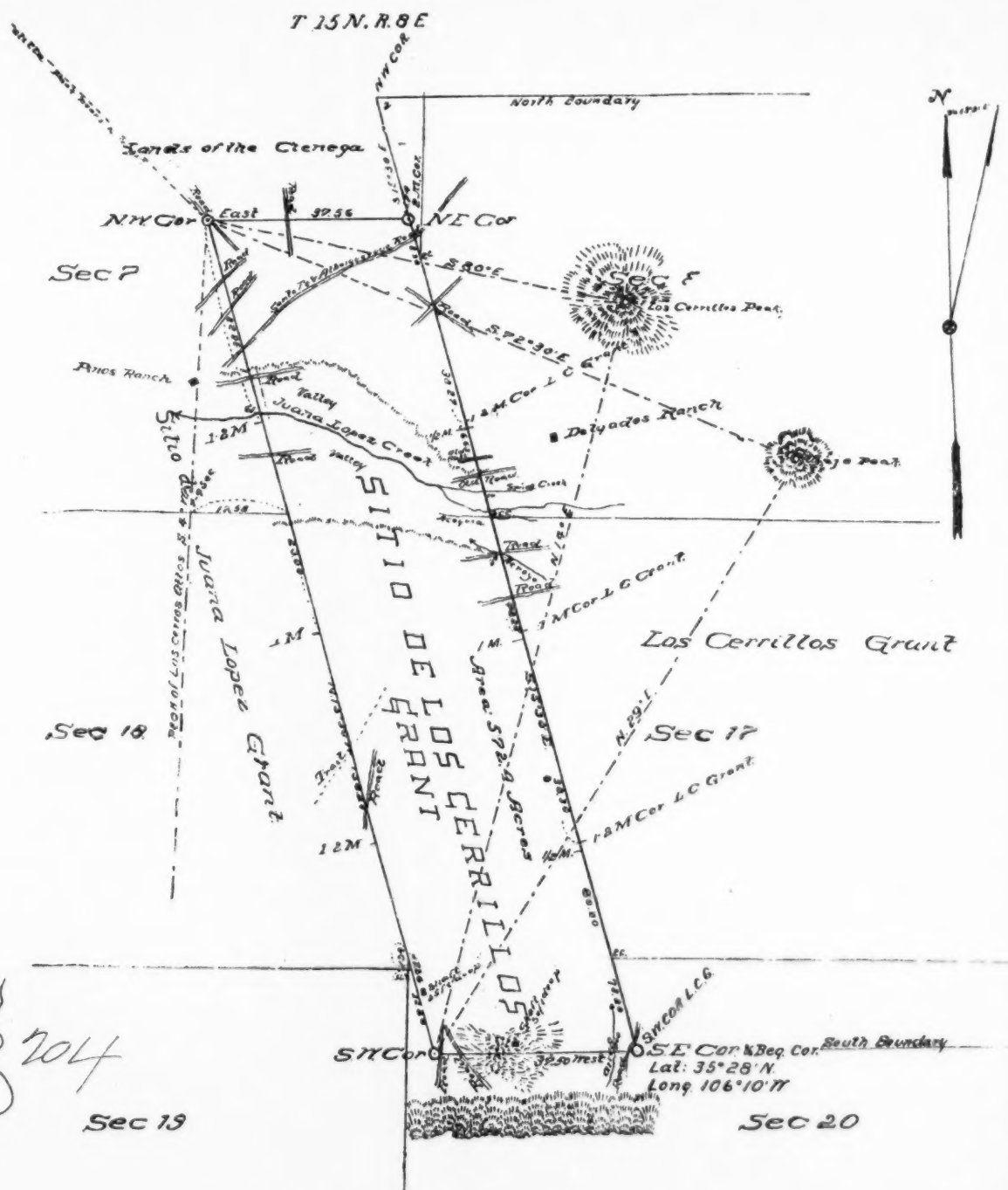
High Hills Sec 21

Rep. No 59
P.L.C. No 78

285

No 40
Serra } p. 255
A. S. S. }

No. 73
Serra. } p. 20.
Turquino Co. }



No. 73. } 204
Sena
Piquette Co }
Se

Sec 19

Sec 20

In the Court of Private Land Claims, Sitting at Santa Fe, New Mexico.

No. 78.

BEATRIZ PEREA DE ARMIJO

VS.

UNITED STATES.

Final Decree.

This cause having heretofore come to be heard upon the pleadings and exhibits on file, and upon the proofs taken, full legal proofs having been taken, and counsel having been heard for said parties, and the petition in this cause having been sustained by satisfactory proofs after due deliberation, the court being now sufficiently advised in the premises, makes the following findings of fact:

1. In the year 1788, Jose Miguel de la Pena presented a petition to Fernando de la Concha, then civil and military governor of the province of New Mexico, setting forth that he had registered a piece of land situate in the place called Los Cerrillos, which had belonged to Alonzo Rael de Aguilar, the grandfather of his wife, Maria Rael, and that it had been abandoned for many years, and that said Alonzo had lost the right which he had had, and that said Pena therefore asked of the governor that said land be given to him for himself, his children and heirs. On the 20th of April, 1788, the said governor visited the said tract of land and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof.

2. That said land has been in the continuous and undisputed possession of the heirs of said Alonzo Rael de Aguilar and their legal representatives from the time of the delivery of possession thereof by the said governor, as aforesaid, in the year 1788, down to the present time.

3. The petitioner is the legal successor in interest in part to the rights of the said heirs of the said Alonzo Rael de Aguilar. The court finds, as a matter of law, that the petitioner is entitled to a confirmation of the claim set up in her petition for the said land to the heirs and legal representative of the said Alonzo Rael de Aguilar.

The court hereby specifies that the said land is located in the county of Santa Fe and Territory of New Mexico, and is commonly called the Cerrillos grant, and is bounded on the north by the boundaries of the Canada del Guicu and lands of the Bacas; on the south, by the high hills; on the east, by the road which goes to Galisteo, and on the west, by the lands of the grant to Cleto de Miera and Pedro Bautista Pino; that said land measures from east to west twenty-five hundred varas.

It is therefore ordered, adjudged and decreed by the court that the claim of the petitioner for the land hereinbefore described and

set forth be and the same is hereby confirmed to the heirs and legal representatives of Alonzo Rael de Aguilar; provided, however, as to any part thereof which may have been sold or granted by the United States to any other person, that such title from the United States to such other person shall remain valid, notwithstanding this decree, and leave is hereby given to said petitioner hereafter to present her claim to this court and make proof thereof as to the value of any such lands so sold or granted by the United States; and provided, further, that this confirmation shall not confer any right or title to any gold, silver or quicksilver mines or mineral of the same.

JOSEPH R. REED,
Chief Justice.

(Here follows map marked p. 206.)

160

Mr 73.
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Mr. REYNOLDS: I offer in evidence the petition and the grant papers in the Cerrillos grant tract; and the approved plat,—unless I have already offered it before—and we can cover it in that way, and also to show the claim of the Cerrillos tract before the surveyor general, before the preliminary survey, showing at that time it was larger than it is now.

These documents were not produced, but were to be marked Defendant's Exhibit No. 68.

Senor Governor and Lieut. Colonel Don Fernando Chacon.

Don Cleto Miera, Distinguished Sargeant of this Royal Post in company with Don Pedro Pino. together and in conformity we appear before your Honor in all form and we say, that finding ourselves, the first without a piece of land to work in any place, because of my having been always in the service of the King my Master (whom may God preserve); the second being also without land to plant, for the reason that the place at which he now is is very small; wherefore we have resolved to petition your Honor for a piece of land which is known to belong to the Crown, to-wit, the Sitio de los Cerrillos, which we beg your Honor will deign to give us with peaceable possession, in the name of his majesty; its boundaries being: on the east the Ojo de los Cerrillos; on the west the boundaries of the Sitio de Juana Lopez; on the north the boundaries of the Sitio de la Cienega; on the south the wooded hills; which we beg that your Honor will deign to give us with possession, which we expect from your Honor's benignity, and in the granting of our petition we will receive favor.

Santa Fe, January 21, 1788.

(Undecipherable) to your Honor your most obedient subjects.

CLETO DE MIERA. [RUBRIC.]

PEDRO BAPTA. PINO. [RUBRIC.]

SANTA FE, *January 24, 1788.*

I consent to the grant of the lands which the petitioners ask for, whom I inform that they should not understand this to be in perpetuity, but only for the present, and until the time when circumstances may compel me, as well as my successors, to determine otherwise.

CONCHA. [RUBRIC.]

Date ut supra.

In order that the taking possession of this land be confirmed, the Alcalde Mayor of (this) city, Don Juan Ortiz, will proceed to give it, making careful investigation as to whether any Indian or resident, (of) those occupying contiguous lands, is prejudiced; and it being ascertained that there is no detriment to any third person, he will report in continuation of this decree in order to copy it in the Government book of this Province, and afterwards on stamped paper (when that which is expected shall arrive), as a juridical document.

CONCHA. [RUBRIC.]

In this place of Los Cerrillos, on the 11th day of the month of February of the present year of 1788, I, said Alcalde Mayor, ad interim, in obedience of that which was ordered by Don Fernando de la Concha, Knight Comendador de Mora, of the Order of Santiago, Lieutenant Colonel (of) the Royal Armies of His Majesty, Governor (civil) and military of this Province of New Mexico and Inspector General, ad interim of his armies, having proceeded to the said place to give possession to the two who make petition, one of whom is the Sergeant Don Anacleto de Miera, and the other Don Pedro Pino, the heirs of Don Alfonzo Rael de Aguilar, being present, in the presence of all I made and measured a cord of fifty Castillian varas (in length), and with three eye-witnesses who were Don Joseph Miguel de la Pena, Bernardo de Sena Maese, and Juan Domingo Baldes, I went and measured the land which his Honor granted to the said two petitioners, having first drawn a boundary line which divides the lands which belong to the heirs of the said Don Alfonzo Rael, and on the west side between the lands of the said Rael and those of Don Pedro Pino, I measured nine hundred varas, of which I gave, in the name of his Majesty, whom may God preserve, to Don Cleto de Miera four hundred and fifty varas and to Don Pedro Pino as many more, which I gave to them in the same manner and terms in which his Honor grants them, having designated and made known their boundaries to them, which are: on the east and west lands of the Rael, and of the said Pino, and on the south the high hills, in a straight line, and on the north the boundary line of the Cienega; which possessions remain pendant and suspended until the stamped paper which is expected shall arrive. Thus I proceeded in this place of Juana Lopez on said day and month and year, to all of which I certify.

JU. ANTO ORTIZ. [RUBRIC.]

Santa Fe, April 1st, 1788.

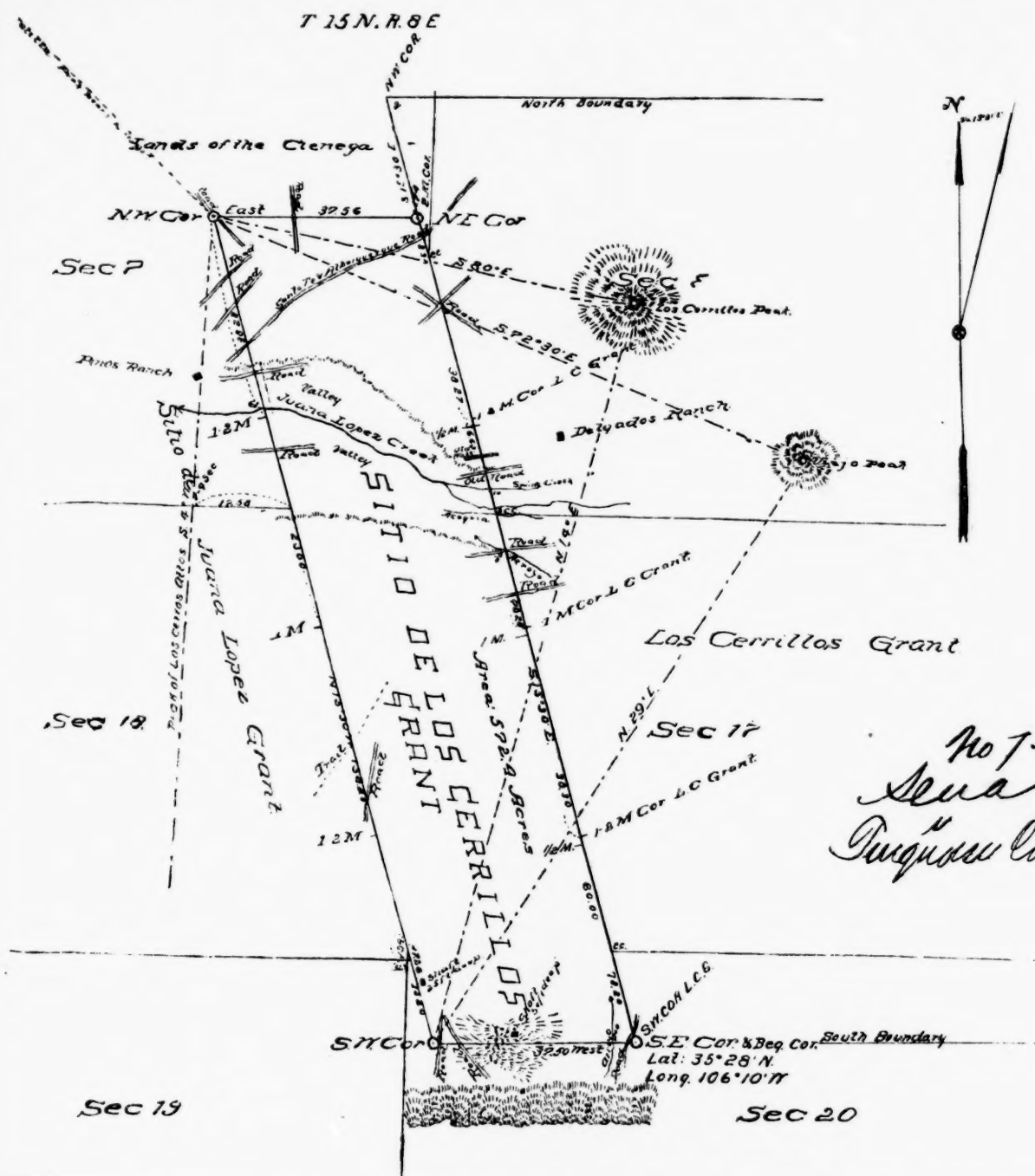
Let the document relating to this grant be perfected by the Alcalde Proprietario, Don Josef Ortiz.

CONCHA. [RUBRIC.]

(Final Decree.)

This cause having heretofore come on to be heard upon the pleadings and exhibits on file and upon the proofs taken, full legal
210 proof having been taken and counsel having been heard for said parties and the petition in this cause having been sustained by satisfactory proofs, after due deliberation, the court being now sufficiently advised in the premises, gives the following findings of fact:

1. That on the 21st day of January, 1788, Cleto de Miera and Pedro Baptista Pino presented their petition to Don Fernando Concha, then Governor of the Province of New Mexico, asking for the grant of a piece of land known as the Sitio de los Cerrillos, setting forth as the boundaries, on the east the Ojo de los Cerrillos, on the west the boundaries of the Sitio de Juana Lopez, on the north



the boundaries of the Sitio de la Cienega, and on the south the wooded hills; and that on the 24th of January, 1788, the said Governor made an order granting the lands asked for, but stating that this was not to be in perpetuity, but only for the present and until the time when circumstances might compel him or his successors to determine otherwise; and that the same day the said Governor made another order directing the Alcalde Mayor of Santa Fe to deliver possession and to report the same in continuation of the decree as a juridical document, and that on the 11th day of February, 1788, the said Alcalde Mayor in obedience to the said order of the said Governor delivered juridical possession of said land to the said grantees and made a report of his proceedings, in which report he declares the boundaries to be on the east the lands of the heirs of Alfonso Rael; on the west the lands of the grantee Pino; on the north the boundary line of the Cienega, and on the south the high hills, said land being nine hundred varas in width from east to west.

2. That the said grantees went into possession of said land on said 11th day of February, 1788, and by themselves, their heirs and legal representatives have retained and held continuous and undisputed possession of the same until the present time.

3. That the petitioner is the legal successor in interest in part to the rights of the said original grantees.

The Court finds as matter of law that the petitioner is entitled to a confirmation of the claim set up in her petition, to the heirs and legal representatives of the said Cleto de Miera and Pedro Baptista Pino.

The Court specifies that the said land is located in the county of Santa Fe and Territory of New Mexico, and is bounded as
212 hereinbefore set forth.

It is therefore ordered, adjudged and decreed by the Court that the claim of the petitioner for the land hereinbefore described and set forth be and the same hereby is confirmed to the heirs and legal representatives of the said Cleto de Miera and Pedro Baptista Pino, provided however, as to any part thereof which may have been sold or granted by the United States to any other person, that such title from the United States to such other person shall remain valid, notwithstanding this decree, and leave is hereby given to the said petitioner hereafter to present her claim to this court and make proof thereof as to the value of any such lands so sold or granted by the United States; and provided further, that this confirmation shall not confer any right or title to any gold, silver or quicksilver mines or minerals of the same.

JOSEPH R. REED,
Chief Justice.

(Here follows map marked p. 211.)

Mr. DAVIS: I desire to prove, if the court please, the fact, of which I suppose the books in the treasurer's office are the best evidence * * * but I do not desire him to bring in the books,—from the year 1895, that not one of the five mining claims, involved in this suit has ever been assessed for taxation. The reason being obvious,—for they have been exempt from taxation by reason of the laws of the Territory.

The COURT: I believe only surface improvements are taxable in in this Territory.

Mr. DAVIS: The assessments on the surface improvements and the personal property have been paid, but the mining claims, as claimed here, evidently have never been assessed for taxation.

Mr. F. W. CLANCY: If you say they have never been assessed by name, I will admit that is so.

Mr. DAVIS: There is an assessment against The American Turquoise Company, in the following language on the tax roll: "Surface improvements, land and personal property." What I desire to prove is that the tax roll does not show any tax against any one of the mining claims.

Mr. F. W. CLANCY: If you say the mining claims have not been assessed and know that is so, let it go into the record.

Mr. DAVIS: The tax records show just as I have stated. The taxes on the improvements have been paid.

Mr. F. W. CLANCY: When was the first payment made?

213 Mr. DAVIS: In 1895 or in 1896.

Mr. REYNOLDS: Unless it is admitted, I desire to offer in evidence the patent of the United States to Thomas Whalen, for the northeast quarter of Section 34.

Mr. CLANCY: I don't think it is necessary—we agreed that Mr. Muller should send you memoranda of the entries within this claimed tract and their condition, and I think that should go in evidence as a part of his evidence.

Mr. REYNOLDS: The point I was after was to fix the time of the original patent—Homestead certificate No. 1820, application No. 2630. The date of the patent is the second day of September, 1892.

Mr. CLANCY: I object to the evidence as to any such patent, and the evidence which Mr. Fritz Muller is going to furnish us as to these entries—as not in any way tending to prove anything in issue in this cause, and as entirely irrelevant and immaterial.

Objection overruled by the court.

Exception reserved by Mr. Clancy.

Marked Defendant's Exhibit No. 69.

Mr. REYNOLDS: Now the last evidence we have unless the pleadings admit it, is the fact that no claim was asserted in the office of the Surveyor General with reference to this claim or map filed by anybody until the claim was filed in 1900 for confirmation of the grant by Mr. Sena.

Mr. CLANCY: I will admit there were no proceedings initiated so far as the records show in the Surveyor General's office—so far as this grant is concerned, but the original grant, which is a part of the evidence here has always been in the Surveyor General's office.

Mr. REYNOLDS: Archive No. 441 is on file in the Surveyor General's office, and I presume have always been there, but no claim was made through the act of 1854, and the regulations in the Surveyor General's office, or otherwise, for this claim, by any of the parties to claim this grant.

Mr. CLANCY: I will admit that no proceedings were initiated by any one, in the office of the Surveyor General with regard to this grant.

Mr. REYNOLDS: Under the act of 1854.

Mr. CLANCY: My position is it was not incumbent upon any one to do anything of the kind. The act of 1854 imposed no duty upon any one except the surveyor general. *I will ask that*
 214 I will admit that there were no proceedings initiated in the surveyor general's office by anybody with reference to this grant.

Mr. REYNOLDS: That is all I want.

Mr. CLANCY: I think I should add in that connection that this archive, or grant papers, was in the list of papers reported by the surveyor general to the department of the interior and transmitted to congress in 1855.

Mr. REYNOLDS: I don't know whether it was transmitted in the year 1855, but Archive No. 441, was one of the list of archives that were reported under the regulations required to the department. That is true and I will admit it.

Mr. CLANCY: The index number and archive number here is 441.

Mr. CLANCY: I think you will also admit this—that in the report of the surveyor general, to the secretary of the interior, dated September 30, 1856, in schedule No. 2, which was an abstract of grants of land selected from the public records of the territory, found in the archives at Santa Fe, New Mexico, No. 87, out of a total of 197, reads, as follows:

"May 25th, 1728—Leyba, Jose de, Santa Fe County—Juan Domingo de Bustamente, Governor, which was printed in congressional documents of 1856, page 231, 245."

Mr. REYNOLDS: I have no disposition to deny it. It is a fact. It is a part of the report.

Defendants rest.

Plaintiff's Rebuttal.

FELIPE PINO, sworn.

Direct examination by H. S. CLANCY:

Q. Mr. Pino, you have stated heretofore, during the trial of this case that you were acquainted with Josefa Deyba, and Salvador Leyba, her nephew.

A. Not my nephew—my brother-in-law.

Q. Her nephew, I say—the nephew of Josefa Leyba.

A. Oh, yes, sir.

Q. Now state to the court and jury, how intimate your acquaintance was?

A. I was so intimate with him, that before he married my sister-in-law, his friendly relations with my father and myself were very intimate, and we were familiar. I knew him very well, in every respect.

215 Q. Now in regard to Josefa—you have been speaking of Salvador?

A. I was speaking of the two of them. When Salvador Leyba married my sister-in-law, our relations were very intimate at all times.

Q. State whether or not you were in the habit of visiting the house of Josefa frequently?

A. Very frequently.

Q. Now state whether or not you know of any acts by either Josefa or Salvador, acts of possession, in regard to the Jose de Leyba Grant?

Mr. DAVIS: If this is confined to acts he saw them do—that he saw them do things on the grant—there is no objection from us. If it is intended hereby to get in statements of Josefa or Salvador as to their possession of the Leyba Grant, we object to it as hearsay, and furthermore not rebuttal testimony.

Mr. CLANCY: I endeavored to avoid anything of that kind in the case in chief because it could only be proper in rebuttal.

Mr. DAVIS: I object on the further ground it calls for the conclusion of this witness as to acts of possession.

The COURT: I think I will let it in—as to what he himself saw them do—whether he saw them living there.

Mr. REYNOLDS: I desire to put in a further objection. It leaves to this witness the conclusion of acts of possession.

The COURT: I will allow him to answer, and if it is not responsive, I will take it from the jury.

WITNESS: I know by the acts which they did that they had possession of the land and of the Ojo del Coyote. I knew it from themselves. They had stock there—cows and oxen, burros and I don't know what else.

Mr. DAVIS: I move to strike that out.

Mr. CLANCY: Don't interrupt him—let us hear what he has to say—I think he will explain how he knows these things.

Mr. DAVIS: He has already stated that he knew it from them. The witness says—"He knew it from them"—It is purely hearsay and declarations in their own favor.

The COURT to WITNESS:

Q. Is that your entire answer?

Mr. CLANCY: I suggest that the court ask him, how he knew they had stock there.

The COURT:

Q. State how you know that the Leybas had stock there at the Ojo del Coyote?

216 A. Josefa Leyba told me that, and Salvador told me that also, and at the times I was at the Ojo del Coyote, I understood from other people, that the place belonged to the

Leybas. The last time I was there to the place with my father—he sent me there for some oxen. Some gentlemen—I remember one, Juan Leyba, he was a peon of Don Manuel Delgado—I told him, “This is a beautiful place; it is a proper place for stock.” I says, “Has Don Manuel Delgado his stock here?” and he says, “No, this land belongs to some Leybas.” That is what I knew at that time.

Mr. DAVIS: Now I renew my motion to strike out, not only the answer of the witness, which was before objected to, but now to the statements he has just made, as to declarations made to him by the Leybas, and as to the conversation he had at the spring with a man named Juan Leyba, and other persons, on the ground it is hearsay.

The COURT: I will sustain the objection.

The COURT to Mr. CLANCY: I think if he saw cattle there himself of Salvador Leyba, it might be competent. I don't think what the men told him was admissible.

Mr. H. S. CLANCY:

Q. How do you know that these animals of the Leybas were pastured on the Leyba Grant, or at the Ojo del Coyote?

Mr. DAVIS: That is objected to as the witness has answered it in the other question. There is no testimony from this witness or anybody else, there ever were any cattle pastured on the Leyba grant. The question assumes a state of facts that don't exist.

The COURT:

Q. Did you ever see Salvador Leyba there at the Coyote Springs?

A. No, sir.

Q. Did you ever see his wife there?

A. No, sir.

Q. Did you ever know of their being there yourself?

A. Yes, sir.

Q. How do you know it? You say you never saw them there.

A. No, sir.

Q. All you know is what people told you then?

A. Yes, sir.

The COURT: I will sustain the objection.

Exception reserved by plaintiff's counsel.

Mr. H. S. CLANCY:

217 Q. Mr. Pino, I will ask you if you know of your own personal knowledge of any cattle belonging to either Salvador Leyba or Josefa Leyba being pastured on either the Leyba Grant, or at the Ojo del Coyote. Cattle that you personally knew belonged to those people?

A. Yes, I know.

Q. State whether or not you know as to the use made by either Josefa Leyba or Salvador Leyba of these cattle, of your own personal knowledge?

A. I knew that they had given them on shares to a lady named Manuela Tenorio. I don't know whether they were 30 or 40 head

of stock, and of the increase, when they received them. I don't know what they did with them.

Q. Do you know of your personal knowledge, whether those cattle that were on shares, were ever turned over to the owner?

A. Yes, sir; I know that they were delivered to them.

Q. When were they delivered?

A. They delivered them to them here in Santa Fe. I know also they used to bring stock to kill. Not always, but sometimes. I saw that, because I lived close by. Our houses were right close to each other.

Q. Can you state any other acts either by Josefa Leyba or Salvador Leyba, in regard to this tract of land, of your own personal knowledge?

A. They used to tell me that property belong to them.

Mr. DAVIS: I move to strike that out.

The COURT: Oh, I don't think it makes any difference. It is hearsay. You can except to it.

Mr. DAVIS: I will be compelled to take an exception to it. You can prove pedigree by hearsay, but not ownership of property.

Q. When did you first become acquainted with the tract of land in question?

A. About 1858 or 1859, I think.

The COURT:

Q. What part of it did you know at that time—was it the spring?

A. I knew the spring and the country around there. I did not go around it very much.

Mr. H. S. CLANCY:

Q. As I understand you, you visited the Ojo del Coyote before 1858?

A. I think I was there one time. I think I was there three or four times during the time I visited there.

218 Q. At the first time that you visited the Ojo del Coyote, where was the nearest house where people were living?

Mr. CLANCY: What I desire to show is the nature of the country was such that at that time at least there was no one living in permanent habitations within the limits of this grant, and that the nearest place where anybody was living was at the place called Los Cerrillos, at the Delgado Ranch.

Mr. REYNOLDS: That is all right. I will admit that, too.

ANDRES C. DE BACA recalled.

Direct-examination by Mr. H. S. CLANCY:

Q. Are you acquainted with a man named Michael O'Neil?

A. Yes, sir, I am.

Q. How long have you been acquainted with him?

A. For about sixteen or eighteen years.

Q. Mr. O'Neil has testified in this case that a number of years ago you had informed him that the arroyo at the canyon below the Coyote Springs was called the Coyote Canyon. State whether you ever gave Mr. O'Neil such information.

A. I could not tell him that, because I have never known the place by that name.

Q. Did you ever hear of any canyon in that section of the country known as Coyote Canyon?

MR. REYNOLDS: This witness testified to the names of the canyons and the conditions down there before. It seems to me this was gone into by Mr. Baca and was one of the things gone into in chief.

MR. CLANCY: We say there never was any such canyon in existence, and it was first introduced into the case by evidence for the defendant.

THE COURT: Well, proceed.

Exception reserved by defendant's counsel.

MR. CLANCY: We desire to show not merely the contradiction of the witness O'Neil, but contradiction of the fact that there is any such canyon in that section, known by that name.

A. No, sir.

Q. Are you acquainted with Diego Mares?

A. Yes, sir, I am.

Q. For how long have you been acquainted with him?

A. I have known him since 1869.

Q. Do you know where Mr. Diego Mares lives at the present time?

219 A. I think he lives in the town of Waldo, or Cerrillos now.

Q. Is it or is it not a fact that Mares lives at La Cienega in Precinct No. 6?

THE COURT: He says he lives at Waldo or Cerrillos.

MR. CLANCY: I desire to find out if he ever lived at that place and when he ceased to live there.

MR. CLANCY:

Q. Do you know whether Diego Mares ever lived at La Cienega, in Precinct No. 6 of this county?

A. Yes, when I first knew him he lived there.

Q. Do you know when he ceased to live there?

A. I think he went out of the precinct in about 1882 or 1883.

Q. And do you know of your own personal knowledge that he is not a resident of that precinct now?

Objected to as leading.

Objection sustained. Exception reserved.

Q. Is Mares a man of family?

A. Yes, sir, he is.

Q. Do you know of his ever having any other place of residence outside the La Cienega and Waldo, as you have testified?

A. Yes, I knew him to live once at a place near San Marcos. He

took a homestead at the Canada de las Gallinas, at the San Marcos hill and at one time for some time he was living at Carbonateville too.

Mr. REYNOLDS to Witness: Did you hear Mr. O'Neil testify yesterday or this morning?

A. No, sir, I did not.

Testimony closed.

The foregoing was all the testimony introduced in the case.

TERRITORY OF NEW MEXICO,
County of San Miguel:

I, W. E. Gortner, official stenographer by appointment, certify that the foregoing contains a true, perfect and correct transcript of the testimony introduced on the part of the plaintiff and defendant, in said cause, as the same was taken down and transcribed by me.

Witness my hand this 10th day of May, 1906.

W. E. GORTNER, *Stenographer.*

Mr. F. W. CLANCY to Court:

I desire, on the part of the plaintiff, first to address myself to the court, and to ask the court to direct the jury to find a verdict in favor of the plaintiff upon the whole evidence. In support of that I want to say that the record discloses here—aside from the plea of general issue—which merely puts upon the plaintiff the burden of establishing his case—to go to the jury. The defense raised here first is that of the statute of limitations, and secondly, as near as I can understand the pleadings, there is an attempt to set up an equitable estoppel against the plaintiff. So there would be two subjects for consideration. Our position is that there has been an entire failure to establish anything whatever under the defense of the statute of limitations or adverse possession, and I shall be compelled to take a little time to call your Honor's attention to the results of a somewhat careful investigation which we have made as to the law applicable to such evidence in support of a plea of the statute of limitations to title by adverse possession, as appears in this case * * *

Mr. DAVIS to Court:

The propositions relied upon by the defendant in this case, in support of the motion to instruct the jury in its favor, are four:

1. The proposition that it has not been shown, that the grant of plaintiff is a perfect grant.

2. The proposition that even though the grant of the plaintiff may have been perfect, that he has lost his rights by reason of laches.

3. The third argument in this case—the defendant claims that the deed introduced in evidence from Salvador Leyba to himself, the only claim which he has shown for his own title, is an absolute nullity and is void, for the reason that it was made when the grantor

was not in the possession of the premises, but had been ousted by the defendant in this case.

4. The fourth proposition is, that even granting all that plaintiff has claimed in this case as to the character of his grant, that none the less he is barred by the strict rule of the statute of limitations.

Argument here followed, by Mr. Clancy, for plaintiff, and Messrs. Reynolds and Davis on behalf of defendant, and at the conclusion of which the court made the following ruling:

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221 The court instructs the jury that under the pleadings and evidence introduced the plaintiff is not entitled to recover in this action, and the verdict will be for the defendant, and instructs the jury to return a verdict of not guilty as to the defendant, The American Turquoise Company.

Sante Fe, September 1, 1905.

In ruling on the motion of plaintiff and defendant to instruct the jury, the court said:

The COURT: Gentlemen, in the case of Mariano Sena vs. American Turquoise Company, an ejectment suit, the evidence has all been heard and each side has made a motion, asking the court to direct the jury to return a verdict. Before proceeding further, the court will appoint R. J. Palen, Esq., foreman of the jury.

In this class of cases, gentlemen, we recognize that the plaintiff has to recover on the strength of his own title and not on the weakness of that of the defendant. That is so in all cases of ejectment. The first point raised in this case—and if that is decided in favor of the defendant, it practically settles the case—and the other three points the defendant relies upon, that of estoppel and the statutes of limitation—it will not be necessary to pass upon them.

The first ground of the motion of defendants for an instruction of the court for the jury to return a verdict, is that this is not a perfect grant; that it is what they allege and what they claim. It is in evidence here that this case was before the land court—not this case, but the Jose de Leyba grant was before the land court, and it was put in before the land court after the time for filing imperfect grants had expired. The land court, as I understand it, held that this grant was not a perfect grant, and therefore could not come in at that time, because the period of two years allowed for filing these imperfect grants had expired, and they rendered a decision against the confirmation of this grant. That case was taken to the Supreme Court of the United States, but the Supreme Court did not pass on the question whether or not this grant was a perfect grant, but on reading that case, I am of the opinion that they very strongly intimated, that in the opinion of the court, it was not. Now, as I understand it—a perfect grant, is a grant where the title papers

are perfect. In this case the original grant seems to have been a paper grant made by Governor Bustamente, and the possession probably is as good as in most of the grants—but there is a serious question as to whether this is any grant at all, on account of it never having been approved by the King of Spain, which the laws of Spain at that time required in order to make it a grant—but perhaps, as these parties were in possession at the time, and the fact that the Supreme Court says, in 1838, I think is the date of that last will,—it might be held that these people claimed it, and there being no proof they were dispossessed, there was a tacit confirmation of the grant. Whether that is so or not, perhaps it is not necessary to pass upon here. Now another thing to constitute a perfect grant: I think the description of the boundaries must be such that any person after taking evidence as to the boundaries must be able to locate it on the earth surface. The Supreme Court say that the western boundary (and a part of the western boundary you claim to have proved)—the Supreme Court say that the western boundary and the southern boundary is exceedingly imperfect, and it is almost impossible for anybody to locate it.

From the evidence introduced here, it seems to me it cannot be doubted that it is a fact, that these two—the western and southern boundaries are very imperfect. You claim that it is bounded by a straight line from the land of Juan Garcia de las Rivas. That only covers a small part of the western boundary as claimed. The Cerrillos Grant comes over it. Which would be the better grant I don't know. It is certainly a grant, which certainly could not be decided without evidence and without a hearing. The line on the south is also I think very doubtful—as to where that line is—that is the arroyo Cuesta del Oregano,—several witnesses testified that there was such a Cuesta of the Canada, and it was at such a place while others testified there is no such place at all. Four or five witnesses—I don't recall how many—testified there is no such a place as the Canada Oregano, and that they never heard of it. I don't think it could be ascertained without taking a great deal of testimony.

I am of the opinion that this is not a perfect grant within the contemplation of the law, and not being a perfect grant that the plaintiff, Mariano F. Sena, has no title to it. I therefore will have to overrule the motion made by the plaintiff, asking for an instruction of the court to the jury to find for the plaintiff. Having held as I do in regard to this grant, it is not necessary to speak of the other points which were raised.

I think, however, in this class of cases—I think these people have got a right in going on the land, and they had held it adversely. I think the United States cannot take it away from them. I don't think the United States could repeal the mining laws and take away the land of these people so long as they complied with the law under which they took it, and I am inclined to think the statutes of limitations would be good, and if the statute of limitations would be good, that defense would also be good.

As to the question of estoppel, I don't think there has been anything shown here which would act as an equitable estoppel. There is some doubt whether equitable estoppel can be pleaded in this class of law cases.

Holding as I do, that this grant was not a perfect grant, I will have to sustain the motion of the defendant to instruct the jury to return a verdict for the defendant. If I did not—if the jury found for the plaintiff in this case—as I think, as a matter of law, it is not a perfect grant—if the jury should find in favor of the plaintiff, the court would have to set aside the verdict. Therefore, I will instruct the jury to return a verdict for the defendant, The American Turquoise Company, and to this you gentlemen may except and pray an appeal and it is granted.

Mr. F. W. CLANCY: Before asking for an appeal, we desire to submit a motion for a new trial.

Mr. DAVIS: Mr. Clancy and I can prepare a verdict to place on the record.

Exception reserved by plaintiff's counsel to the action of the court in directing a verdict, and in overruling the motion of plaintiff to direct the jury to return verdict for the plaintiff.

And afterwards, on the 4th day of September, 1905, plaintiff filed his motion for a new trial of said cause, which said motion is as follows, to-wit:

Now comes the plaintiff by his attorneys and moves the court to set aside the verdict heretofore rendered herein, and to order a new trial of this cause for the following reasons:

1. The court erred in admitting improper evidence on behalf of defendant.

2. The court erred in excluding proper evidence offered on behalf of plaintiff.

3. The court erred in directing a verdict for defendant.

224 4. The court erred in holding that the title of plaintiff was imperfect.

5. The court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

6. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

7. The verdict is contrary to the evidence.

8. The verdict is contrary to the law.

9. The verdict is contrary to the weight of the evidence.

10. The court erred in refusing to instruct the jury to find in favor of the plaintiff.

11. There is no evidence to support the verdict.

12. The court erred in holding that plaintiff could not recover unless he had a perfect title to the land in controversy.

13. The land in controversy, included in the alleged mining claims of defendant, was, by the uncontradicted evidence, shown to be within the boundaries of the grant to Jose de Leyba.

F. W. CLANCY

H. S. CLANCY,

Attorneys for Plaintiff.

Which said motion was by the court denied, to which ruling the plaintiff then and there excepted.

And afterwards, on the 4th day of September, 1905, plaintiff filed his motion to arrest the judgment in said cause, which said motion is as follows, to-wit:

Now comes the plaintiff by his attorneys and moves the court to arrest the judgment on the verdict heretofore rendered herein, for the following reasons:

1. The court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The issue tendered by the replication numbered 10, to part of the third amended plea, was an immaterial issue.

9. The court erred in overruling plaintiff's demurrer to portions of the third amended plea, thus forcing plaintiff to reply to those portions.

10. The issue tendered by the replication to the portions of the third amended plea, previously demurred to, was an immaterial issue.

F. W. CLANCY AND

H. S. CLANCY,

Attorneys for Plaintiff.

Which said motion was by the court denied, to which ruling the plaintiff then and there excepted.

And because the foregoing matters may not otherwise be of record in said cause, the plaintiff asks that this, his bill of exceptions, containing the same, be signed, sealed and made a part of the record, which is accordingly done this 28th day of August, 1906, and it is hereby certified that this bill of exceptions contains all of the evidence offered or received on the trial of said cause, with the excep-

tion of defendant's Exhibits 61 and 62 which appear to be lacking,
as to which, however, it is further certified that said exhibits
226 were not actually produced in court and shown to the
jury, counsel for defendant stating, at the time, that they
were in the land office in Washington and that copies would later
be supplied to complete the record, but such copies never have been
furnished, and are not material to this record.

WILLIAM J. MILLS,
*Chief Justice of Supreme Court of New Mexico,
and Judge of the District Court of San Miguel
County.*

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

I, the undersigned, clerk of the district court of said county,
hereby certify that the foregoing is a full, true and perfect copy of
so much of the record in a certain cause lately pending in said district
court wherein Mariano F. Sena was plaintiff and the American
Turquoise Company was defendant, as I was directed by plaintiff's
counsel to include herein as a record for the review of said case in
the Supreme Court of said Territory.

In witness whereof, I hereunto set my hand and the seal of said
district court this tenth day of October, A. D. 1906.

[SEAL.]

SECUNDINO ROMERO, *Clerk.*

227 And Afterwards, on towit: on the first day of December,
A. D., 1906, there was filed in the office of the Clerk of the
Supreme Court of the Territory of New Mexico, an assignment of
errors in the above entitled cause, which said assignment of error
was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1167.

MARIANO F. SENA, Plaintiff in Error,

vs.

AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

Assignment of Errors.

Now comes the plaintiff in error, and says that there is manifest
error in the record and proceedings in this cause in the court below,
and assigns the following as such errors:

1: That the Court erred in sustaining the demurrer to the replica-
tion, numbered 2, to the second amended plea, thus forcing plaintiff
to go to trial without the benefit of what is set up in said replication.

2. The court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The Court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The Court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing the plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The Court erred in compelling plaintiff to go to trial on the issue tendered by replication numbered 10 to part of the third amended plea, which was an immaterial issue.

9. The court erred in compelling plaintiff to go to trial upon the issue tendered by the replication to portions of the third amended plea, previously demurred to, which was an immaterial issue.

10. The court erred in directing a verdict for the defendant.

11. The Court erred in refusing to direct a verdict in favor of the plaintiff.

12. The court erred in holding that the title of plaintiff was imperfect.

13. The Court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

14. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which the plaintiff has title.

15. The Court erred in holding that the plaintiff could not recover unless he had a perfect title to the land in controversy.

16. The court erred in excluding from evidence plaintiff's exhibit "M" (p. 89-90 of record).

17. The court erred in admitting in evidence location notices of five mining claims, which are defendant's Exhibits 1 to 5 inclusive. (p. 100-1 of Record).

18. The Court erred in admitting in evidence, deeds of conveyance of said mining claims, which are Defendant's Exhibits 6 to 17, both inclusive (pp. 101-6 of Record).

19. The Court erred in admitting in evidence notices to hold and

work four mining claims, which are Defendant's Exhibits 18 to 21, both inclusive, (pp. 107-7 of Record).

20. The Court erred in admitting in evidence proof of labor on five mining claims for years 1896 to 1903, both inclusive, which are defendant's Exhibits 22 to 57, both inclusive, (pp. 107 to 114, of Record).

21. The court erred in admitting in evidence the depositions of Nazario Gonzales and Jesus Narvais, which is defendant's Exhibit 66 (p. 174 of Record).

22. The court erred in admitting any evidence as to patents or entries under the public land laws (p. 199 of Record).

23. The court erred in denying plaintiff's motion for new trial.

24. The court erred in denying plaintiff's motion in arrest of Judgment.

Wherefore plaintiff in error prays judgment of this record, and that the judgment therein contained be reversed, set aside, and altogether held for naught, and that judgment be entered in this court in favor of said plaintiff, or that this case be remanded to the court below with directions to vacate the said judgment and set aside the verdict upon which the judgment was based, and to order a new trial of the issue between the parties.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Plaintiff in Error.

230 which said assignment of error was and is endorsed on the back thereof as follows, to-wit: "No. 1167, Supreme Court of New Mexico. Mariano F. Sena vs. American Turquoise Company. Assignment of errors. Filed in my office this Dec. 1st, 1906. Jose D. Sena, Clerk.

And afterwards, on to wit, At a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1907, on the tenth day of the said regular term, the same being Monday the twenty-fifth day of February, the following among other proceedings were had and entered of record to-wit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,

vs.

AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

It is ordered by the court that Honorable Matt G. Reynolds, be and he hereby is admitted to practice before this Court, for the purposes of this cause.

And afterwards, on to wit, on the tenth day of the said Regular Term, the same being Monday the 25th day of February, A. D., 1907, the following among other proceedings were had and entered of record, following towit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

This cause coming on for hearing upon the transcript of record, as-ignment of errors and briefs of counsel, is argued by
231 F. W. Clancy, Esq. for Plaintiff in error, and Matt G. Reynolds, Esq. and Stephen B. Davis, Jr., Esq., for defendant in error, and submitted to the court, and the court not being sufficiently advised of the premises takes the same under advisement.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D., 1908, on the fourteenth day of the said regular term, the same being Wednesday, the second day of September, A. D., 1908, the following among other proceedings were had and entered of record, following to wit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Frank W. Parker, Associate Justices, Abbott, Mann and McFie, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the court that the said defendant in error go hence without day and recover of the plaintiff in error Mariano F. Sena, its costs in this behalf expended for which let execution issue.

232 And afterwards, on to wit: on the second day of September A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in words and figures following towit:

233 In the Supreme Court of the Territory of New Mexico.

January Term, A. D., 1908.

No. 1167.

MARIANO F. SENA, Plaintiff in Error,

vs.

THE AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

Opinion of the Court.

PARKER, J.

This is an action in ejectment brought by plaintiff to recover possession of certain lands in Santa Fe County. Plaintiff claims these lands to be within a Spanish Grant made in 1728 by the Governor and Captain General of the province of New Mexico to Jose de Leyba, from whom he derains title. Defendant is in possession by virtue of certain mining locations, the first being made as far back as 1885, attacks the validity of the Jose de Leyba Grant, relies on the statute of limitations, the alleged laches of plaintiff, and also asserts the invalidity of plaintiff's deed from the heirs of Jose de Leyba on the ground that at the time of its execution the land in controversy was in defendant's adverse possession. While the pleadings are somewhat extensive, the foregoing is a fair statement of the issues as made both by the pleadings and the proofs during the course of the trial. There is a little conflict as to the facts, and the decision of this Court must turn entirely on the law points involved. Some of these points were discussed when the grant now relied on by plaintiff was before the court of Private Land Claims, and the Supreme Court of the United States (Sena vs. U. S., 189 U. 233) and although the decision of those courts is not res-adjudicata in this case, still their reasoning is persuasive and their conclusions valuable aids towards the correct determination of the same questions by this Court.

The first and only question we deem it necessary to examine, is as to the character of the Jose de Leyba Grant. Its present
234 value, as the basis of title, depends entirely on its original character and the recognition to which it was entitled under the laws of Spain and Mexico, for it has not been confirmed either by Act of Congress or by the Court of Private Land Claims, and has therefore received no strength from any action of the political department of our government.

In Ely's Administrator vs. U. S., 171, U. S. 220, Mr. Justice

Brewer remarks that few cases are more perplexing than those involving Mexican Grants. This is true, whether the Grant originated under Mexican or Spanish Rule. Yet in this case we are forced to a discussion of the Spanish law as applicable to the Jose de Leyba Grant, for if it was not a complete and perfect grant under Spanish law it is not available to plaintiff as the foundation on which to base this action of ejectment. If it is an imperfect grant, its recognition is forbidden by Section 12 of the Act of Congress of March 3, 1891, providing that such grants after two years should be considered by all courts as abandoned and should be forever barred. By this statute, this court is, of course, bound.

Perhaps the distinction between perfect and imperfect grants is best defined in the case of Hancock vs. McKinney, 7, Tex. 384; at least that case has been often cited on the point, and is quoted from in the brief for plaintiff in error. In that case the Supreme Court of Texas in discussing this point with reference to grants made by Coahuila and Texas, and the rule would be the same by whatever sovereignty the particular grant was made, says:

"The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this Court, and resulted in the acknowledgement of the distinction, and resting it on the following basis, that is to say: If the grant were to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the government or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance."

The distinction between perfect and imperfect grants has also been discussed by this court in the Ojo de Borrego and the Antonio Baca grant cases 12 N. M. 62 and 169.

Applying this rule to the case at bar we must enquire whether or not anything remained to be done by the Government of Spain or by its officers in connection with the Jose de Leyba Grant. If so, then that grant does not measure up to the standard and must be declared imperfect.

The Jose de Leyba Grant having been made in 1728, is subject to the provisions of the Royal Regulation of the King of Spain dated at San Lorenzo el Real, October 15, 1752 (2 White's Recp. 62). It appears that this regulation was made necessary by a royal decree dated November 24, 1735, the terms of which required that all grants of land within the Spanish dominion should be approved by the King himself before being finally valid. When we consider the extent of Spanish rule and the difficulty of communication between Madrid and the distant provinces, the inconveniences necessarily caused by this order is obvious. While the Spanish Government was not willing to trust the complete disposition of the royal lands to subordinate officers, still it realized the necessity of taking steps to make more simple the acquisition of titles, and for that purpose the King by the Regulations of 1754 did away with the ne-

cessity of his personal confirmation. By the first section of the Regulation the Viceroys and Presidents of the Royal Audiencias were ordered to appoint sub-delegates who should be entrusted with this duty, and, to render it still easier to comply with the King's will, by section 12 the confirmatory power was conferred on the Governors of distant provinces, in which class New Mexico would doubtless fall, acting under the advice of certain other officials (2 White Receptilacion p. 66). Section 3 provides that all persons holding grants made after 1700 should exhibit their title to the proper officer for confirmation, and that a failure so to do should result in their being "deprived of and ejected from such lands, and grants of them made to other persons."

In 1754 the government of Spain was that of an absolute monarchy, and it is not for us to question the right of the King to compel holders of titles theretofore given to apply for confirmation. It was therefore necessary for the then claimant of the Jose de Leyba Grant to obtain such confirmation. Without it his grant became void and he could at any time be ejected by the sovereign, or any other person to whom the same land was equally granted. There is no documentary proof before us of any such application, or of any confirmatory action by the Spanish Governor or other officer. It is not unlikely that the certificate of confirmation would be endorsed on, or attached to the original grant papers, but no such certificate appears though the original is in evidence. It being incumbent upon plaintiff to show that his grant was perfect, its confirmation became a necessary element in his proof. No such evidence having been introduced, the grant must necessarily be held imperfect, unless such confirmation is to be presumed from the surrounding facts and circumstances.

Counsel for the defendant claims that such presumption arises in this case, and cites *U. S. v. Chavez*, 175 U. S. 520 and *U. S. v. Pendell*, 185, U. S. 196. These cases hold that from a long and uninterrupted possession the law may presume such formal instruments as are requisite to title. In the *Chaves* case the grant claimant was in the actual possession of the land claimed by him at the time of his petition to the Court of Private Land Claims, and there had been a long uninterrupted possession both under Mexico and the United States. The court says that such continuous possession on the part of the claimant and his predecessors in interest had been shown from some time prior to 1785, inferentially from 1716, and from that kind of possession, coupled with the other circumstances of the case, found the presumption sufficient upon which to base judgment.

237 In the *Pendell* case the Court of Private Land Claims affirmatively found:

"That the land included in the said out-boundaries continued in the possession of the land grantee, his heirs, legal representatives and assigns, from the time of the making thereof prior to the year 1790, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee."

It will thus be seen that the proof of possession of the grants in those cases was absolutely, unquestionable, uninterrupted and continuing to the time of the Court's decision. It is on this kind of possession that the court bases its presumption of title.

In this case the plaintiff was not in possession of any portion of the grant at the time of the commencement of the present proceeding, and no one of his predecessors, in interest had been in possession since the American occupation. The various documents bearing date prior to 1840 show a claim of ownership rather than actual use, and the title claimed may or may not have been accompanied by possession.

Counsel for Plaintiff seek to invoke the principle that a statute once established, is presumed to continue until the contrary appears and to substitute this principle for proof of possession. We have examined all of the cases cited in illustration of the application of this principle and find none in which it has been held sufficient to support a presumption of a grant or confirmation of a grant.

In discussing this phase of the question of the character of the Jose de Leyba Grant, the Court of Private Land Claims, said:

"The evidence as to settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant and knowledge of its existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting."

238 "In as much as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700 unless already confirmed by royal order of the King or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case either by the documents presented or otherwise, that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any grounds that will justify a presumption of such compliance with the requirements for confirmation."

With this conclusion we agree.

Counsel asserts that the facts in this case are different from those before the Court of Private Land claims and Supreme Court of the United States, and points out the will of the son of the original grantee in 1783, disposing of this land, and the deed of the grandson of the grantee in 1834, the informal pledge of the property in 1855 by the aunt of plaintiff's grantor and certain acts of dominion about the same time as not having been before the former courts. But we do not deem these facts, even if properly admitted in evidence, as sufficient to show such possession as would raise the presumption invoked.

It therefore clearly appears that the grant under which plaintiff claims is an imperfect grant, and as such furnishes no basis for an action of ejectment.

This conclusion renders it unnecessary to examine the other questions raised. The judgment of the Court below will be affirmed. And it is so ordered.

FRANK W. PARKER,
Associate Justice.

We Concur:

IRA A. ABBOTT, *A. J.*
EDWARD A. MANN, *A. J.*
JOHN R. McFIE, *A. J.*

Mills, C. J., having tried this case below did not participate in this decision. Pope, A. J., having been of counsel took no part in this decision.

239 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing two hundred and thirty eight pages, contain, a true full and complete copy of the record and proceedings, pleadings and opinions, in the above entitled cause, as the same appears of record and remain on file in my office at Santa Fe, New Mexico.

Witness, my hand and the seal of the Supreme Court of the Territory of New Mexico, this the fifteenth day of September, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk Supreme Court of New Mexico.

240 THE UNITED STATES OF AMERICA:

To The American Turquoise Company, Greeting:

You are hereby cited and adminished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein Mariano F. Sena, was plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 4th day of September, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice, Etc.

Service of the above citation is hereby acknowledged this 16th day of September, 1908, at Las Vegas, New Mexico.

AMERICAN TURQUOISE COMPANY,
By STEPHEN B. DAVIS, JR.,
One of Its Attorneys of Record.

Endorsed on cover: File No. 21,347. New Mexico Territory, Supreme Court. Term No. 73. Mariano F. Sena, plaintiff in error, vs. American Turquoise Company. Filed October 1st, 1908. File No. 21,347.

Office Supreme Court, U. S.
FILED.

APR 10 1911

JAMES H. MCKENNEY,
CLERK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

IN ERROR TO THE SUPREME COURT OF NEW MEXICO.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for defendant in error is able, attractive, and plausible, but is more remarkable, as we will hereinafter show, for that which it omits—for its failures to meet what is set up in our original brief—than it is for what it actually sets out. This will be apparent as we proceed with this hurried attempt by way of reply.

FIRST.

As to what is to be reviewed by this court.

Counsel for defendant appear now to have discovered, as shown under the first point of their brief, that when both parties to an action at law ask the court to direct a verdict, the appellate court is limited to an ascertainment of whether there is evidence to support the court's finding of facts. Our

original brief, in its first, second, and third points, was constructed on this theory, to show that, so far as the district court approached any finding of facts, it had no support in the evidence; while the fourth, fifth, and sixth points combated the defense of the statute of limitations as to which the court made no definite finding; and the seventh, eighth, and ninth points discussed errors in rulings on the pleadings, which, among other things, raised a question of estoppel upon which the court found in our favor.

The court's finding of facts, if it really made any, appears on pages 172-3 of the printed record. Condensed, it will be seen that the court said that the western and southern boundaries were imperfect, the western boundary because the Cerrillos grant comes over the boundary, and the southern because it is doubtful "where that line is." He also says he is "inclined to think the statute of limitations would be good, and if the statute of limitations would be good, that defense would also be good"; and that "as to the question of estoppel, I don't think there has been anything shown here which would act as an equitable estoppel."

Premising that any conflict of this grant with the Cerrillos grant made sixty years later could not be tried in this case, we submit that the learned judge's finding of doubt as to the southern and western boundaries is fully met and overcome by what is presented under the second and third points of our original brief. It should be said that the judge of the district court did not say or mean that the boundaries as stated in the grant papers were imperfect, but he shows that the evidence to identify and locate them was not satisfactory to his mind, and that is the full extent of his finding on that matter. This will be apparent by reading all of the quotation at page 20 of defendant's brief, but it is a *non sequitur* to conclude, as he did, that as a matter of law the title is imperfect because he had some doubt as to the exact location of the southern boundary. He did

not express doubt as to the location of the western boundary, and there is no room for doubt, as we have shown in our original brief. As to the southern boundary, we have also shown that the evidence does not admit of any doubt of its being located south of the Coyote Spring, which spring is clearly within the grant, and the land sued for is far inside of the western and southern boundaries—that is, far east of a north and south line through the unmistakable Peñasco Blanco de las Golondrinas, and far north of the Coyote Spring which is necessarily north of the south boundary. The northern and eastern boundaries are not questioned.

As to the southern boundary, the court goes only so far as to say "The line on the south is also, I think, very doubtful—as to where that line is," but there is no finding as to there being even a doubt as to the property sued for being north of that boundary and within the grant.

This so-called finding of facts leaves the door open to an extended examination of all the evidence and seems, in itself, to be definitely conclusive of no material fact.

SECOND.

As to possession by the grantee and his descendants, which raises presumption of confirmation under royal instruction of 1754.

Notwithstanding the fact, as pointed out in our original brief, that this court in effect declined to affirm the decree of the court of private land claims upon the ground stated by that court of a lack of confirmation or approval under the royal instruction of 1754, and practically invited plaintiff to continue, in the ordinary courts, his assertion of title to the property, counsel for defendant see fit to devote much space to the discussion of the alleged defect in plaintiff's title because of the claimed lack of such confirmation.

In view of the opinion of this court in 189 U. S., 242, we had given less attention in our original brief to this subject than we otherwise would. Strengthened as our case now is, beyond what it was when this court would not look with favor upon this objection, it seemed unnecessary to go further into the matter.

We now feel compelled to make some direct reply to what appears to us to be unfair statements in defendant's brief, and to suggest, by way of further reply, that the decree or instruction of 1754 never was in force in New Mexico.

Beginning on page 11 of defendant's brief, counsel, fairly enough, at first state that the argument of plaintiff (erroneously called defendant in error) is "that although there is no record proof of confirmation the evidence as to possession of the grant is such that confirmation will be presumed"; but this is followed by an imputation to plaintiff of an attempt to prove possession through mere claims of title and by a calm assumption "that for more than ten years prior to the commencement of this action the land has been in the actual adverse possession of defendant in error." This entirely avoids and ignores the arguments in our original brief, under the first point thereof, as to presumption of continuance of possession when proved once to have existed, and, under our sixth point, as to the insufficiency of defendant's evidence to prove such actual continuous possession as the statute requires, to neither of which is any answer anywhere attempted, and is followed by a plausible, but unsound and inaccurate, effort to show that the grant of 1728, the will of Simeon de Leyba of 1783, and the deed of 1834 by Salvador Antonio Leyba to Juan Angel Leyba, indicate no more than mere claims of title and contain no evidence of ownership or possession. We assert the contrary, and will briefly show the correctness of our position.

First, as a part of the original grant documents, we have

the act of juridical possession, executed May 25, 1728, by the alcalde mayor of Santa Fe, in pursuance of the order and authority given by Governor Bustamante on May 24, 1728 (erroneously copied and printed as May 29, 1728), which shows actual, formal delivery of possession, on the ground, of the land granted, with the usual solemnities of such delivery under the Spanish law, which were much like those constituting livery of seizin at the common law (*Record*, p. 32). After the lapse of nearly two centuries it would be difficult, if not impossible, in any case to produce better or more satisfactory evidence that a grantee entered into actual possession of his land.

Therefore the presumption of the continuance of that possession, set out at pages 22 to 24 of our original brief, becomes applicable, together with the rule that the burden of proof is on him who disputes the continuance of the possession.

The further evidence demonstrates the wisdom and correctness of the presumption invoked, as we have, second, the will of the son of the original grantee, made October 15, 1783, more than fifty-five years after the delivery of juridical possession, clearly showing both ownership and possession (*Record*, pp. 45 to 47). The testator recites that he finds himself at his ranch, far from home, and believes himself unable to live or be moved, in consequence of a mortal blow from an unbroken mule, and the officer who wrote the will certifies that it was executed "at this place of the Coyote Spring"; and the testator sets out that he has a grant given to his deceased father, Joseph de Leiba, in 1728, and that "In said grant there is constructed a ranch at the Coyote Spring, a small house, two rooms and a small kitchen, a little tower, a large corral of poles, two corrals for young animals, a corn-crib not very large with corn and beans, a hut (*jacal*) in the temporal lands." No will could contain more definite, substantial statements of actual

possession, use, and occupation, and all under the very title in question.

A little explanation seems necessary. The testator was following a very general practice in Spanish wills of enumerating all of his possessions, and of debts due to and from him, of which at least one instance has come to the attention of this court.

Bergere vs. United States, 168 U. S., 80-1.

The little tower (*torreon*) mentioned in the will was a circular stone building made for refuge from, and defense against, hostile, savage Indians. Such towers were common in New Mexico.

The "temporal lands" are lands dependent upon rainfall for necessary moisture to raise crops, as distinguished from irrigable lands; and the use of the phrase in the will, coupled with the fact of the existence of a *jacal* in such lands, seems to imply that there were both irrigable and temporal farming lands in the grant, and that the latter were at a considerable distance from the ranch buildings at the Coyote Spring, as it was necessary to build a hut for the use of those who planted them. It is true that at the present time the water at the Coyote Spring does not appear sufficient for irrigating purposes, but aqueous conditions may have been different 127 years ago.

Can there be any doubt that the possession in 1783, under the grant, was a continuation of an unbroken possession from 1728, over fifty-five years in duration, of which twenty-nine years were after the royal instruction of 1754? This alone ought to be enough, but there is more.

Again we invoke the presumption of continuance of possession, and find its application again justified by the third undisputed piece of documentary evidence, the deed in 1834 by Salvador Antonio Leyba, the only son and heir of Simeon de Leyba as shown by the will of 1783, to his

son Juan Angel Leyba (*Record*, p. 48). The grantor conveyed all his right which came to him by inheritance "in the rancho of the Coyote Spring with its houses and corrals, together with the grant in which the said rancho is situated," the grant being identified by its date, the name of the original grantee, and its boundaries. It is also in evidence that afterward the grantee in the deed, Juan Angel Leyba, was killed by Indians at the Ojo del Coyote, at his own ranch, after his son Salvador was born (*Record*, pp. 52-3), Salvador being about the same age as the witness Felipe Pino, who was born in 1839 (*Record*, p. 51). How long it was after Salvador was born that his father was killed is not shown by the evidence. The fact, as shown by the deed, that in 1834 there were houses and corrals at the Coyote Spring, within the grant owned by the then only descendant of the original grantee, coupled with the fact that Juan Angel was killed at that ranch five or more years later, corroborates the propriety, if corroboration be necessary or admissible, of the application of the presumption of the continuance of the possession of 1728 and of the possession of 1783. This possession, continued for more than 110 years from the time of the grant, and for more than eighty-five years after 1754, must be enough to meet the most exacting requirement as to evidence of possession.

Under these circumstances, what possible thing could have been done, or step taken, to add to the strength, validity or perfection of this title by the Mexican government, from which the United States acquired New Mexico in 1848, after it had had dominion and control for over a quarter of a century? The answer must be that nothing could have been so done, and, if so, this title was perfect within the definition agreed to on both sides of this case. The royal instruction of 1754 certainly disappeared with Mexican independence, if it had not been abandoned sooner by the Spanish government. Moreover, it was not self-

executing, any more than any Spanish or Mexican law under which denouncements might be made and forfeitures declared, and the Leyba title never having been forfeited under Spain remained unassailable under Mexico. It was a perfect title by the Spanish law of prescription, if in no other way. We believe it to be clear that there never was any foundation for the assertion by the court of private land claims, quoted with approval by the Supreme Court of New Mexico, that confirmation under the order of 1754 was "a prerequisite to validity" of a grant made prior to that year.

THIRD.

Was the instruction of 1754 ever in force in New Mexico?

This question presents peculiar difficulties. There is no proof whatever in the records and history of New Mexico that the royal order of 1754 was there ever in force or observed. Promulgation, in each jurisdiction, was, under Spain, necessary to put any law or public order there in force. Thus, a law might be in force in Santa Fe at one time and in Albuquerque at another, a week or a month later. There are numerous records of such publications to be found in the Spanish archives of New Mexico, but none of this order of 1754. The absence of such record, however, would not in itself be conclusive, or, indeed, of any very great importance, as the archives are not continuous or complete, but may be of some significance in connection with other circumstances from which we may be forced to believe that the Spanish authorities never considered this order adapted to conditions in New Mexico and never caused it to be put there in force.

The instruction itself, while in one place, in the recital or preamble which precedes the ordering portions, the word

mercedes (grants) is used, yet, in all other parts speaks only of sales and compositions (or adjustments) (*ventas y composiciones*) of royal lands, whereby the royal treasury would be enriched. Now, as far as we have been able to discover, there never was in New Mexico, under the rule of Spain, a single case of a sale or composition of royal lands.

We will, later, revert to what was actually done in New Mexico as to the making of grants—a matter of such general, historical nature that this court will take judicial notice of it—but will first call attention to the provisions of the instruction of 1754, to show that they never were applicable to New Mexican grants like the one now under consideration.

The first section provides for the appointment, by the viceroys and presidents of the Royal Audiencias, of subdelegates, or deputies, to take charge of the *venta y composicion* of the royal lands, to whom should be sent their respective appointments with a copy of the instruction, and for the continuance of the subdelegates, or deputies, already in existence, with authority to both classes further to delegate their power to others in places distant from their residences.

It can be asserted that no such subdelegates, or deputies, were ever appointed or known in New Mexico at any time.

Section 2 does not appear to be of any importance to this discussion.

By section 3 of the instruction, the principal subdelegates, or deputies, upon receiving the instruction, and their appointments, are directed to send general orders to the justices of the principal places in their respective districts, to be published in the same manner as general orders from the viceroys, in order that all persons in possession of royal lands since the year 1700 up to the time of the publication may come before the subdelegate, or deputy, to show by what title they hold possession, with notice that they may be dispossessed and the lands given to others if they fail

to present their titles within the time fixed. If such publication had been made in New Mexico it would have been at seven different places, and it is strange that no record of it can be found if it ever was made.

Section 4 of the instruction relates to lands held by sale or composition made by subdelegates, or deputies, before 1700, or by prescription, and is not material to the present case.

Section 5 of the instruction is the important one, and that upon which defendant's counsel principally rely, and they quote a translation of it in full on page 8 of their brief. It is to be noted that they quote from White's Recopilacion, although the translation to be found in Reynold's Spanish Law, at page 53, is a much better one. It provides, in substance, that possession of lands sold or adjusted (not "compromised" as in White) by subdelegates, or deputies, after 1700, are not to be molested, provided they have been confirmed by the king or by viceroys and presidents of the audiencias; but those who possess lands without such confirmation must come to ask it before the audiencias or the officers to whom this power is given by this new instruction, who, in view of the process, or report, of the subdelegates, or deputies, as to the measurement and value of the lands and of the title issued, shall examine as to whether the sale or composition was made without fraud or collusion and for proportionate and equitable prices, with the presence of attorneys general (*fiscales*), so that if it appears that the price of the sale or composition and the tax of *media anata* have been paid to the royal treasury, and after performing whatever pecuniary service appears necessary, the confirmation may issue in the royal name.

Section 6 provides that in cases of sales and compositions, not confirmed since 1700, if it appear that the lands have not been surveyed or appraised, the confirmation shall be suspended until survey and appraisal, and in accordance

with the greater value which may result therefrom the pecuniary service shall be regulated.

Sections 7, 8, and 10 do not seem to be of importance to the matter now under consideration.

Section 9 provides that the confirmations of the sales and compositions shall be by the audiencias, when the attorney general (*fiscal*) has passed on them, and the audiencias shall fix the pecuniary service which must be made for the new grant.

Section 11 gives the audiencias jurisdiction of appeals from the subdelegates or deputies.

Section 12 provides that in provinces distant from the audiencias, mentioning a number by name, "and others in like circumstances," which might include New Mexico, confirmations shall be made by their governors with approval of the royal officers and of the acting attorney general (*teniente general letrado*) where there is one, with authority to decide appeals from the subdelegates, or deputies, in each of such provinces, without resorting to the audiencias.

Section 13 relates to the proceeds of sales and compositions and of the pecuniary service arising from confirmations, and to the manner of keeping account thereof and of reporting the same to the king, while section 14 provides as compensation to the subdelegates, or deputies, two per cent of the proceeds of the sales and compositions.

It will be apparent, as the most obvious and prominent feature of this instruction, that it was intended as a revenue-producing measure, and it is a historical fact, of general notoriety, that there never was a time in New Mexico, under the rule of Spain, when revenue could have been derived from the sale or composition of lands in that jurisdiction. The poverty of the people, combined with remoteness from any possible market for surplus products and almost continuous warfare with savage Indians, made life a struggle for mere existence, and to these conditions must be attrib-

uted the fact that no subdelegate, or deputy, was ever appointed, no presentation of titles ever made, and no confirmation thereof by governors or audiencias ever had.

The Spanish archives in the office of the surveyor general at Santa Fe show records of about seventy grants of land from 1700 to 1754, and over twenty more before the end of the century, of which many have been confirmed as perfect titles by the court of private land claims and a few so held to be by this court, but not one of them ever received any approval or confirmation under the instruction of 1754. A number of other grants of the 18th century have been produced from private custody, but in no case has there come to light any confirmation, or attempt to obtain such confirmation. The instruction of 1754 was practically non-existent in New Mexico.

In the archives in the office of the surveyor general at Santa Fe, No. 1271 is a draft of a letter from the acting governor of New Mexico, Joseph Manrique, to Nemecio Salcedo, Comandante General de las Provincias Internas de Nuevo España, dated November 16, 1809, which is instructive, as it contains a statement of how grants of land had been made in New Mexico. The letter shows that it is in answer to one from Salcedo asking for information as to the extent of the land for which Francisco Ortiz had petitioned, about which the acting governor had previously written, and also as to the forms, terms, and considerations with which grants had been made in New Mexico, and after answering the first question the writer proceeds as follows:

"The customary practice of making similar grants has been exercised by this government without giving any notice to (or calling to the attention of) any higher authority, giving attention always to the need which was made to appear by the inhabitants of this province who have been steadily increasing: For this purpose they have presented petitions similar to that which I sent to your lordship with my

communication No. 160 of the 30th of June last, and the government, convinced of the needs of the claimants, has ordered that the *alcaldes mayores* of their respective territories (or jurisdictions) should put the settlers in possession, measuring the sitios and formalizing the grants in the name of His Majesty, upon the condition of their forming houses or organized settlements, breaking and cultivating the farming lands, enjoying the pastures and other lands of the sitios in common, and of fencing as far as possible the cultivated fields, but this last ordinarily is without effect. This has been the course which has been followed up to the present time, and in this way have been given all the grants which the inhabitants of this province possess; but as I desire to be careful in everything and not to risk, in any way, exceeding my power, I sent to your lordship the said petition with what appeared to me to be a proper report, in order that your lordship might consider it."

There is no reason to doubt the accuracy of the foregoing statement by Governor Manrique, which is, however, corroborated by all the records of all the grants made during the 18th century in New Mexico.

Reverting to the order of 1754, it is to be noted that in itself it calls for its own publication or promulgation, in the same manner as the general orders of viceroys. Such publications were well known and frequently made in New Mexico, and the Spanish archives, now in the Library of Congress, furnish numerous records of such publications, which follow the general requirements of the law on this subject, which are set out in the following translation from the great *Diccionario de Legislacion y Jurisprudencia* of Joaquin Eseriche, edition of 1847:

"PROMULGATION.—The formal publication of a law for the purpose of giving notice thereof to all. The 12th law, title the 2nd, book 5, of the Nov. Recop. has the following to say on this point: 'In ac-

cordance with the law, and with what has been the practice in regard to all decrees made, let it be known to the people of this court and of the other settlements of this kingdom, that no law, rule, or general new decree, shall be observed or enforced unless it shall have been previously made known or published by means of ordinance, schedule, order, edict, writ, or by crier, by officers of justice, or the public magistrates; and any one arrogating unto himself the authority to put into execution, or who shall feign or announce the existence, on his own personal responsibility, of any laws or uncertain rules or statutes of government, or, instead, seditious matters, written or verbal, with or without signature, in papers or anonymous letters, without there previously existing any of the above prescribed circumstances and requisites, shall be punished by the ordinary authorities as a conspirator against the public peace; and for such purpose he is declared henceforth to be a state prisoner, and the privileged proofs shall avail against him; and to carry the foregoing into effect, and to avoid the abuses which have been experienced, let this decree be printed and a certified copy of the same sent to the chamber of the court alcaldes, that they may make it known to the public by proclamation; and (copies) to the chancellors, courts, and other magistrates of the kingdom, so that they may observe it and publish it in the usual manner, and care for exact obedience to it.'

"The law once promulgated is in effect, unless the law itself provides for its becoming effective at a different time, as is done on some occasions; however, as long as it is not promulgated it is of no effect, since it does not exist as to the public until after publication. Thus it is that if an individual committed a deed not prohibited by any existing law, and that act were to be included in the list of offenses by a new law not promulgated at the time of its commission, the individual would not incur the penalty prescribed by the new law, even though it should appear that he previously had notice of it. But once the law is published ignorance of it cannot be

alleged, though there be a great number who truly have no notice of the existence of the law, for '*leges est idem scire, aut debuisse aut potuisse.*'"

The records of such promulgations or publications in New Mexico in the 18th century cover a great variety of matters, including royal orders or decrees, orders of viceroys, and official orders or bandos of the governors, but the manner of publication is substantially the same in all cases. Their number is so great that it would be difficult merely to enumerate them, and to set them out even briefly would require months of preparation. We have examined recently about fifty of such papers, of which there must be many more than one hundred during the 18th century.

There were seven jurisdictions in New Mexico, composed of both Spanish and Indian towns. Publications of matters of general interest affecting the whole people or kingdom were published in all the jurisdictions, but some things of local importance in only a portion. Of the seven there were the three Spanish Villas of Santa Fé, Santa Cruz de la Cañada, and Albuquerque, and the Spanish town of Bernalillo, which included three Indian Pueblos, and the others covered Indian towns only.

A fair sample of an order by a governor as to publication may be found in a bando of Juan Ignacio Flores Mogollon, Governor, dated December 16, 1712, prohibiting visits to the rancherías of savage Indians. Following the substantial part is the order for publication, of which the following is a translation:

"And in order that all of the foregoing may come to the knowledge of all, and that no one may pretend ignorance, I order that it be published in this said Villa, with the sound of the military instruments in an assemblage of all the neighborhood at the usual (or customary) places; and this done, let

it go to all the jurisdictions, going first to that of the Cañada in order that its alcalde mayor may make it public (or may publish it) adding a certificate of having done so, and from there, let it proceed to that of Taos, and being published, then to that of Pecos, and from there to the Villa of Albuquerque and other jurisdictions of Bernalillo and the Queres, whose alcaldes mayores may perform its requirements, adding a note (or certificate) of the publication, and, when completed, return it to this government office."

Another bando by the same governor, dated April 20, 1714, relative to stray animals, the using, selling, and trading of which he stigmatizes as stealing, has added to it the certificates by the different alcaldes mayores of publications, at Santa Fé on the same day; at Albuquerque on April 22; at Isleta on April 23; at Laguna on May 6; at Jemez on May 13; at San Felipe on May 13; at Santa Cruz de la Cañada on May 19, and at Taos on May 23.

The publication of another, including a royal cedula of great importance, is certified in different form. This is the order of Governor Juan Domingo de Bustamante, dated September 3, 1724, which sets out in full the communication he had received from the viceroy at the city of Mexico, the Marquis of Cassafuerte, dated June 26, 1724, in which is copied and certified the cedula of Luis I, dated February 3, 1724, announcing his assumption of authority upon his father's resignation of January 10, 1724. The viceroy sends this to the governor of New Mexico, with direction to have it published. The governor in turn appears to have made a copy for each of his jurisdictions, of which four remain, with certificates of the respective publications added, in the Province of Zuni on September 16, 1724; at Thaos on September 9, 1724; at Bernalillo on September 11, 1724; and at Cochiti and San Felipe on September 9, and at Santo Domingo on September 11, 1724.

This clearly shows the method referred to in the instruction of 1754 as to publication, and it is hardly possible that all record of the publication in New Mexico of that instruction would be gone if any ever existed. Moreover, the records show a continuous, steady correspondence of official character between the governors and the viceroys, and, toward the end of the century, between the governors and the comandante general de las Provincias Internas de Nueva España, but no reference whatever therein to the disposal of the lands of the king or to any approval or confirmation by king, viceroy, audiencia or governor.

In 1786 the Ordenanza de Intendentes was enacted, but this does not appear ever to have been promulgated in New Mexico, probably and properly, because by article 16 thereof the governments of New Mexico and other provinces named were continued undisturbed, so that no lands were ever sold or granted in New Mexico in the manner prescribed in that ordinance.

The conclusion seems irresistible that the instruction of 1754 never was in force in New Mexico, as it is certain that it was never observed, nor any proceedings had under it.

A description of the condition of New Mexico, to be found in one of the documents now in the Congressional Library, may assist in understanding why there never were any sales or compositions of royal lands in the province, or confirmations of land titles, and why grants were steadily made like the one now under consideration, and in the manner described by Governor Manrique in his letter of 1809, already referred to.

On October 10, 1746, Domingo Tres Palacios Escandon, Juez Privatibo del Real Derecho de la Media Anata, addressed a communication to the then governor, Joaquin Codallos y Rabal, calling for information as to conditions in New Mexico, and especially as to the ayuntamiento and alcaldes ordinarios of the Villa of Santa Fe, and whether

any governor had paid the media anata, a preceding governor, Enrique Olavide y Michelena, having asserted exemption therefrom, because his office was military in character. In pursuance of directions to take the evidence of the best residents on these matters, Codallos y Rabal, on August 2 to 5, 1747, took the depositions of six residents of Santa Fe, who testified that no governor had paid the media anata because the office was military, and continually engaged in warfare with the Indians, although it was true that the governors also discharged duties political and judicial in character. They also told, in varying language, of the poverty of the people, so great that few, or none, of them ever paid any taxes, which one attributed to the lack of commerce and money, so that rarely was so much as a real to be seen—one-eighth of a dollar—and that the seven *alcaldes mayores* received no salary and very little or no fees or emoluments on account of the extreme poverty of the people, and that when occasion offered to make campaigns or incursions against the hostile Indians these *alcaldes* and others would go personally in them. They stated also that for many years, one says for twenty-five years, there had been no *ayuntamiento* nor *alcaldes ordinarios* in the Villa de Santa Fe.

Was there any room for subdelegates or deputies, or for sales and compositions of lands in such a region?

FOURTH.

Insufficiency of defendant's evidence of adverse possession.

Defendant's counsel attempt no answer whatever to our clear demonstration, under the sixth point of our original brief, of the insufficiency of the evidence to establish such possession as must be shown to support the defense based on the statute of limitations. They ignore it altogether, and at

various places in their brief (pp. 3, 12, 21, 22, 47, 48) assume, with lofty disregard of what the record discloses, "that these mines have been in the actual, exclusive, physical possession of their claimants for more than the statutory period." They do, on page 23, take sufficient notice of our argument on this point, to say that "It is hardly consistent for defendant (meaning plaintiff) to assert that the facts as to the early possession of the Leyba grant, deduced from mere claims of ownership, are sufficient to raise a presumption of title, and at the same time to argue that the actual possession shown in the mine claimants is insufficient to constitute adverse possession under the statute."

As nothing else is said on this subject, it is not unfair to assert, when we take into account the distinguished ability of our adversaries, that our statement and conclusion as to the evidence of defendant's possession are unanswerable. We have already hereinbefore shown that the early possession of the grant is not "deduced from mere claims of ownership," and that there is no foundation for defendant's plausible and deceptive position on this point.

In this connection, on the same page 23 of their brief, counsel for defendant go on to say: "As to the argument that no taxes were paid on the land, it would seem sufficient to reply that none were assessed, and that the claims were exempt under territorial law." This is not quite ingenuous, and is no reply whatever to our suggestion at pages 47-8 of our original brief. We did not argue that defendant's failure to pay taxes, when none were assessed, in itself constituted a defect in its proof of the statutory adverse possession, but that the statutory requirement as to taxes might evidence a legislative intent not to make the statute applicable to the possession of lands claimed under mining locations, which the same legislature had declared exempt from taxation.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1910

MARIANO F. SENA,

Plaintiff in Error,

vs.

No. 73.

AMERICAN TURQUOISE
COMPANY.

STATEMENT OF FACTS.

This is an action of ejectment brought by plaintiff as owner of a Spanish grant made in the year 1728 to Jose de Leyba, against defendant to recover possession of a portion of said grant, amounting to something over fifty acres, which is claimed by defendant under mining locations made in pursuance of the public laws of the United States. This grant has heretofore been before this court upon an appeal from the court of private land claims, and it is necessary, in order to make a clear statement of the facts, to begin with a brief recital of that former case.

That case was begun by the present plaintiff in error in the court of private land claims, September 29, 1899, to obtain the confirmation by that court of the grant already mentioned, which was made by the King of

Spain through Governor and Captain General Juan Domingo de Bustamante, on the 25th of May, 1728.

The petition for the land, the grant by the governor, and the act of juridical possession, translations of which will be found at pages 31 to 33 of the record in the present case, were a part of the original Spanish archives, which became a part of the records of the office of the surveyor general at the time of the organization of that office in 1855, and no question has been made at any time as to their genuineness or validity. The boundaries of the grant as given in those papers were, on the east by the San Marcos road, on the south by an arroyo called Cuesta del Oregano, on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

In order to identify the western boundary, there was also presented in evidence in the land court, from the same Spanish archives, a deed dated August 12, 1701, made by Joseph Castellanos to Miguel Garcia de la Riva, conveying the sitio of the old pueblo of the Cienega, and also an extract from the book of the Cabildo, which book was also a part of the Spanish archives in the office of the surveyor general. This book of the Cabildo is one in which there was brief record made of grants presented for that purpose in the year 1713, and by the entry of one of the grants presented, it was made to appear that Juan Garcia de las Rivas was the son of Captain Miguel Garcia, the grantee in the deed of 1701. Other documentary evidence was presented to identify the northern boundary, the lands of Sebastian de Vargas, but this is not now important, as later documentary evidence referring to the Leyba grant shows that

boundary to be a road, the existence and location of which are not disputed.

Oral evidence was presented to show the location of the arroyo called Cuesta del Oregano, as being south and east of the Ojo del Coyote, or Coyote Spring. Later discovered documentary evidence of the year 1783 abundantly shows that that spring was in the grant, thus tending to corroborate the evidence as to the location of the arroyo and cuesta.

The case was submitted to the court of private land claims on the case made substantially as above stated, there being no satisfactory evidence of possession by the grantee and his descendants, except that shown by the act of possession given in 1728, and the court rejected the claim, as will be seen by reference to page 142 of the record of the present case, because there was no evidence of a compliance with the royal ordinance of 1754, nor any evidence to justify a presumption of such compliance, wherefore the title was not a perfect one, and the claim must fail because not presented within the time limited for the presentation of imperfect titles by the act creating the court of private land claims. It may be well to quote the material part of the holding of that court:

The first question arising is, What is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant and therefore could be brought into this court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700, unless already confirmed by Royal order of the King or his viceroys,

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or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case, either by the documents or otherwise, that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any ground that will justify a presumption of such compliance with the requirement for such confirmation. It therefore follows that this grant must be held to be not a perfect, but an imperfect grant.

The claimant thereupon took an appeal to this court, but before the case was reached, he made an application to the court for the taking of further testimony, under a provision of the act of congress creating the court of private land claims, submitting a photographic copy and translation of the will of Simon de Leyba, made in 1783, which had been found among the Spanish archives, and asking to take the evidence of Felipe Pino, of Santa Fe, and of Ines Apodaca, at that time about ninety years of age, the mother of Salvador Leyba who sold and conveyed to plaintiff. The court refused to take the evidence of the witnesses named, but received the will.

A little later, by agreement of counsel, certain papers copied from the records of Santa Fe County, New Mexico, which had been discovered by counsel for the United States, were made a part of the record, and thereafter, by a further stipulation, a deed made August 9, 1834, by Salvador Antonio Leyba to his son, Juan Angel Leyba, conveying the grant, was also made a part of the record. Translations of these documents will be found at pages 45 and 48 of the present record.

The will of ¹⁷⁸³~~1728~~ shows that the testator, being at his ranch, far from home, and having received a mortal injury from an unbroken mule, had sent for a military officer, Salvador Rivera, to write his will. It is made to appear by the will, which attempts to recite all of his property, that his ranch referred to was at the Coyote Spring, where he had a number of small structures, and that the ranch was in the grant which had been given by the King of Spain to his deceased father, Joseph de Leyba, in 1728, the boundaries of the grant being recited as follows:

On the south the slope (Cuesta) called the arroyo of the Oregano, on the north the road which goes towards Pecos from the Cerrillos, or lands of the Captain Sebastian de Vargas, on the east with the road which goes from Santa Fe to the spring of San Marcos, on the west with lands of the old pueblo of the Cienega, as appears by the original papers, which are to be found in the trunk of my residence at Santa Fe.

The will also declares that the testator had one son, Salvador Antonio, who was his sole heir. The deed of 1834, made by said Salvador Antonio, conveys the "rancho of the Coyote Spring with its houses and corals together with the grant in which the said rancho is situated," to the son of the grantor, Juan Angel Leyba, and it had been previously shown, by other evidence, that the only son of Juan Angel Leyba, one Salvador Leyba, had conveyed the grant to the plaintiff, Mariano F. Sena.

The papers presented by counsel for the United States from the Santa Fe County records, among other things, include the will of Salvador Antonio Leyba, translation of which is in the present record at page 67,

made March 12, 1836, which gives the names of his four children, one of whom was Juan Angel.

With this additional evidence, which showed unmistakable possession and claim of ownership of the land under the original grant by the son of the grantee in 1783, when he made his will on the grant at the Coyote Spring, and like claim of ownership and possession in 1834, when the owner, grandson of the grantee conveyed the property to his son, the father of plaintiff's grantor, the case was submitted to this court, and while the decree of the court of private land claims was affirmed, yet that affirmance was not on account of lack of evidence of compliance with the requirements of the royal ordinance of 1754, but, in effect, because the court of private land claims was not bound to confirm the grant and that the petition should be dismissed upon the ground of laches, the act of congress creating the court having provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States. The opinion of the court concludes as follows:

If this be considered an imperfect grant, the right to file it expired years ago; if it be a perfect grant, as now claimed, we see no reason why the owner may not prosecute his claim in the territorial courts. Without expressing an opinion as to whether this was a perfect or imperfect grant within the meaning of the law, or whether the boundaries might not still be ascertained by a survey, we are satisfied that it is one which the court of private land claims could not be called upon to confirm and that, if for no other reason, the petition should be dismissed upon the ground of laches.

Sena vs. U. S., 189 U. S. 242.

There was afterwards a modification of the decree of affirmance so that it should be "without prejudice to such further proceedings as petitioner may be advised to take."

The door being thus held open, the plaintiff, within a month thereafter, began the present action, on the trial of which, as we will show, a much stronger case was made than that shown by the record in this court on appeal from the court of private land claims. Attention should be called at this point to the fact that the adverse decision of the supreme court of New Mexico in the present case, is put upon the identical ground which was the basis of the decision of the court of private land claims, of a failure to show compliance with the requirements of the royal ordinance of 1754, and this in the face of the fact that this court had in effect declined so to hold upon the former appeal. It will be apparent that, if this court had so held at that time, there never could have been any further litigation, but this court evidently considered that the will of 1783 and the deed of 1834 went a long way toward raising a presumption of compliance with the requirements of the ordinance of 1754.

This case came on for trial before a jury, and the judge of the court below directed a verdict in favor of defendant, on the ground that the evidence did not show that the grant was a perfect one, because "the western and southern boundaries are very imperfect." (*Record*, p. 172.) The case was removed into the supreme court of the territory by writ of error, and that court decided against the plaintiff upon a different ground from that upon which the district judge based his ac-

tion, and, as already stated, went back to the decision of the court of private land claims, saying that there was a failure to show any compliance with the ordinance of 1754. (*Record*, pages 180 to 182.)

We will now attempt, as briefly as possible, to make a statement of the facts as shown by the record made in the present case. As heretofore stated, this is an action of ejectment, brought to recover possession of portions of the Jose de Leyba grant, situate in Santa Fe County, New Mexico.

The defendant pleaded the general issue and the statute of limitations. It further pleaded, as a third defense, (*Record*, pages 4 to 13), what must have been intended as a species of equitable estoppel, in which was set up, an abandonment, by the owners of the grant, of the possession of the land as early as 1839. Defendant's plea then goes on to set up, at great length, the effect of the treaty of Guadalupe Hidalgo, the passage by Congress of the act to establish the office of surveyor general, the provisions of the 8th and 9th sections of the act, the instructions issued by the Secretary of the Interior to the surveyor general, the failure of plaintiff's predecessors in title to present any claim to the surveyor general, the extension of public surveys over the land in the grant, in 1861, the withholding of the land from entry until 1885, and the subsequent making, by various persons, of mining locations, and the occupation and working of said mines by defendant and its predecessors in title. This plea also set up the acquisition of title by plaintiff, in 1895, the proceedings in the land court, the appeal to this court and the action of this court. Plaintiff replied to the first

and second pleas and to a portion of the third plea, (*Record*, pages 13 to 18), setting up, among other things, the case in the court of private land claims and the failure therein from causes other than negligence in its prosecution, and that the present suit was commenced within six months thereafter. This was to meet the effect, if any, of the plea of the statute of limitations. Plaintiff denied so much of the third plea as **alleged abandonment**, (*Record*, pages 15-16), and demurred to the remainder. (*Record*, pages 18 to 20.) Defendant demurred to all of plaintiff's replications to the pleas of the statute of limitations, except the direct denial thereof. (*Record*, pages 20 to 23).

On May 30, 1905, the district court overruled the demurrer of plaintiff, and sustained the demurrer of defendant, (*Record*, page 23), to which action of the court plaintiff excepted, and has assigned the action of the court on both demurrers as error.

Under the ruling of the district court, the plaintiff was compelled to reply to the remainder of defendant's third plea, (*Record*, pages 24 to **26**), although he insists that the issues thereby raised were immaterial. It seems probable, however, that those issues did not influence the action of that court, as will appear by reference to what the court said at the time it instructed the jury to return a verdict for defendant. (*Record*, page 171).

After the court so instructed the jury, plaintiff interposed motions for new trial and in arrest of judgment, which were both denied. (*Record*, pages 27 to 29).

In the trial of the case plaintiff offered in evidence the original grant papers of 1728, consisting of the

petition of the grantee, the order of the governor making the grant, and the act of juridical possession, translations of which appear in the record at pages 31-2.

He also offered in evidence the will of Simon de Leyba, made October 15, 1783, at his ranch at the Coyote Spring, in which he declares that he had been married to Feliciana Gonzales, then deceased, and had one son, Salvador Antonio, who was his sole heir; that he owned a grant of land given by the King of Spain to his deceased father, Joseph de Leyba, in 1728, and sets out the boundaries of the property so as to make it plain that the northern boundary is the road from the Cerrillos going towards Pecos, and the western boundary the lands of the old pueblo of the Cienega, and refers to the original papers to be found in a trunk at his residence in Santa Fe. He was undoubtedly giving the boundaries from memory and referred to the lands of the old pueblo of the Cienega as the western boundary, although in the grant papers the western boundary is given as the lands of Juan Garcia de las Rivas. But the correctness of the statement in the will is made apparent by reference to certain deeds put in evidence, mention of which will be hereinafter made, and "the old pueblo of the Cienega" is a better description than the name of Juan Garcia de las Rivas who owned the lands nearly sixty years earlier.

The church record of the baptism of Salvador Antonio Leyba on February 14, 1770, as the legitimate son of Simon de Leyba and Feliciana Gonzales, was put in evidence by plaintiff, (*Record*, page 47). There was also put in evidence a deed, made in 1834, from the said Salvador Antonio Leyba to his son, Juan

Angel Leyba, conveying the grant in question, in which deed the boundaries are given substantially the same as in the will of 1783, (*Record*, page 48).

The will of Salvador Antonio Leyba, made March 12, 1836, recites the names of his four children, including Juan Angel, to whom he had made the deed nearly two years earlier, (*Record*, page 67).

The church record of the marriage of Salvador Leyba, February 3, 1860, shows that he was the son of Juan Angel Leyba, deceased, and Maria Ines Apodaca, (*Record*, page 65), and the oral evidence of Felipe Pino, (*Record*, pages 52 to 55), shows that this Salvador Leyba was the son of Juan Leyba, and the grandson of Salvador Antonio Leyba, and that his father, Juan Angel Leyba, was killed by the Indians near the Coyote Spring, after his son Salvador was born. This Salvador Leyba sold and conveyed the grant to the plaintiff Sena on August 16, 1895, (*Record*, pages 77-8).

Upon the question of the identity and location of the western boundary, plaintiff offered in evidence from the Spanish archives a deed, (*Record*, page 34), dated August 12, 1701, from Joseph Castellanos to Miguel Garcia de la Riba, conveying the sitio of the old pueblo of the Cienega, and another deed dated March 12, 1704, (*Record*, pages 36-7), from the grantee in the preceding deed, to his son, Juan Garcia de la Riba, conveying the same sitio of the old pueblo of Cienega, and giving the boundaries thereof, of which the eastern boundary was the Peñasco Blanco de las Golondrinas. Thus we have a well-known natural object, as is shown elsewhere in the evidence, to which we can refer the western

boundary of the Leyba grant, which was described in the original petition of 1728 as the land of Juan Garcia de las Rivas, and in the will of 1783, and in the deed of 1834, as the lands of the old pueblo of the Cienega. By reference to the evidence of Andres C. de Baca, at pages 38 and 69-70, and to the evidence of Felipe Pino at page 56 of the record, it appears that the Peñasco Blanco is a conspicuous and unmistakable natural monument, and its location is shown on the map which appears in the record opposite page 50. There can be no doubt of the existence and location of the Peñasco, which marked the eastern boundary of the lands of Juan Garcia de las Rivas in 1704, thus giving us the western boundary of the lands described in the Leyba grant 24 years later, in 1728. There can be no dispute as to this boundary, the only objection heretofore urged, which will be hereafter considered, being that the Cerrillos grant is between the Leyba grant and the Peñasco Blanco, so as to cover a portion of a north and south line running through the Peñasco Blanco.

The southern boundary of the Leyba grant, in each of the documents, of 1728, 1783, and 1834, is the same, the arroyo called the Cuesta del Oregano. It will be seen that this involves the identification of two natural objects, an arroyo, or water-course, and a cuesta, or a slope or elevation of ground. We will not attempt at this place to set out the evidence as to these objects, as it must be hereinafter discussed, but it may be said that oral evidence submitted by plaintiff positively identified both the arroyo and the cuesta by name, and that the evidence of defendant merely negatives any knowledge on the part of the witnesses called of objects known by

that name, although the existence of such an arroyo and such a cuesta is clearly shown by those witnesses at places corresponding to what is indicated by the documents above referred to, to the south of the Coyote Spring, the ranch which is shown to be within the grant by the will of 1783, and by the deed of 1834. These two papers show that the grant certainly extended further south than the Coyote Spring, the location of which is shown on the map already referred to, and all of the witnesses agree that there is a cuesta to the south of that spring, and an arroyo coming down to the spring from the east. The complaint at page 2 of the record shows that the lands occupied by defendant are in section 21, township 15 north, range 8 east, which the map aforesaid shows to be more than two miles northwest of the Coyote Spring and a somewhat less distance east of a north and south line drawn through the Penasco Blanco.

The district court held that the title to the grant was not perfect on account of uncertainty or imperfection in the western and southern boundaries, (*Record*, page 172). In other words, it was held that doubt about, or difficulty in, the identification of the boundary calls vitiated the character of the title conferred by the grant, and we feel compelled to say that we have been unable to find any precedent to support this doctrine.

The plaintiff has made and filed the following :

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, and says that there is manifest error in the record and proceedings in this cause in the court below, and assigns the following as such error :

1. The district court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The district court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The district court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial, without the benefit of what is set up in said replication.

4. The district court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The district court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The district court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The district court erred in sustaining the demurrer to the replication numbered 8, to the second

amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The district court erred in compelling plaintiff to go to trial on the issue tendered by replication numbered 10 to part of the third amended plea, which was an immaterial issue.

9. The district court error in compelling plaintiff to go to trial upon the issue tendered by the replication to portions of the third amended plea previously demurred to, which was an immaterial issue.

10. The district court erred in directing a verdict for the defendant.

11. The district court erred in refusing to direct a verdict in favor of the plaintiff.

12. The district court erred in holding that the title of plaintiff was imperfect.

13. The district court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

14. The district court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

15. The district court erred in holding that the plaintiff could not recover unless he had a perfect title to the land in controversy.

16. The district court erred in excluding from evidence plaintiff's Exhibit "M". (p. 74 of record.)

17. The district court erred in admitting in evidence location notices of five mining claims, which are defendant's Exhibits 1 to 5 inclusive. (p. 83-4 of record.)

18. The district court erred in admitting in evidence, deeds of conveyance of said mining claims, which

are defendant's Exhibits 6 to 17, both inclusive. (pp. 84 to 88 of record.)

19. The district court erred in admitting in evidence notices to hold and work four mining claims, which are defendant's Exhibits 18 to 21, both inclusive. (pp. 88-9 of record.)

20. The district court erred in admitting in evidence proof of labor on five mining claims for the years 1896 to 1903, both inclusive, which are defendant's Exhibits 22 to 57, both inclusive. (pp. 89 to 94 of record.)

21. The district court erred in admitting in evidence the depositions of Nasario Gonzales and Jesus Narvais, which is defendant's Exhibit 66. (p. 144 of record.)

22. The district court erred in admitting any evidence as to patents or entries under the public land laws. (p. ~~135~~ 136 of record.)

23. The district court erred in denying plaintiff's motion for new trial.

24. The district court erred in denying plaintiff's motion in arrest of judgment.

25. The supreme court erred in affirming the judgment of the district court.

26. The supreme court erred in holding the grant to be imperfect. (p. 182 of record.)

27. The supreme court erred in holding that there was no evidence that the requirements of the ordinance of 1754 had been complied with. (p. 182 of record.)

Wherefore plaintiff in error prays judgment of the record, and that the judgment therein contained be reversed, set aside and altogether held for naught, and

that this case be remanded to the supreme court of New Mexico with directions to vacate the said judgment and to enter a judgment in his favor.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Appellant.

POINTS AND AUTHORITIES.

Preliminary.

The consideration of this case is naturally divided into two principal parts, the first of which is the presentation of the plaintiff's claim of the perfect character of the title to the grant, while the second involves an attempt to show the entire failure of defendant to meet the case by plaintiff. A subordinate division will include the alleged erroneous admission in evidence of depositions on behalf of defendant, and the alleged errors of the district court in its rulings on demurrers, with one anticipatory point as to the validity of the deed to plaintiff, under which he claims.

The case will be discussed under separate and distinct headings, which it may be well here to enumerate:

First,—The title to the grant is perfect.

Second,—The evidence clearly identifies and locates the boundaries.

Third,—Even if there were doubt about the location of the boundaries, the title would not be thereby affected.

Fourth,—Defendant offered no evidence of ownership, or of claim under color of title.

Fifth,—The evidence of mining locations and of claim thereunder, offered to support the defense of adverse possession, was incompetent.

Sixth,—There was no evidence of actual possession for the statutory period.

Seventh,—Laches is no defense, and there is no room for the application of equitable estoppel.

Eighth,—Plaintiff was deprived of the benefit of facts set up in reply to the plea of the statute of limitations.

Ninth,—Depositions taken for use in the court of private land claims, were improperly admitted in evidence, if the court were correct in sustaining demurrer to replication.

Tenth,—The deed to plaintiff is valid.

FIRST.

The title to the grant is perfect.

The grant was made in the year 1728. At that time, there does not appear to have been any limit to the power of the governor and captain general of New Mexico as to the granting of lands belonging to the royal domain. He was the representative of the king in this regard. It seems certain that he was subordinate to the viceroy at Guadalajara and, in some respects, at least, subject to his orders, but, so far as the records disclose, he did not report to that superior officer the giving of lands to those who applied for them, nor did the viceroy ever give any attention to the making, revising or confirming of any grant in New Mexico. Numerous grants made in the eighteenth century in

the same manner as this one, have been held by the court of private land claims, to be perfect titles, such as the Nicolas de Chaves grant made in 1739, the Ana de Manzanares grant made in 1716, and the Antonio Sedillo grant made in 1769.

A Texas statement of the distinction between perfect and imperfect titles, will be instructive:

The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this court, and resulted in the acknowledgment of the distinction, and resting it on the following basis, that is to say: If the grant were to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the government or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance.

Hancock v. McKinney, 7 Tex., 384.

In the present case the title was in such condition at the time of the acquisition of the country by the United States in February, 1848, that nothing which might have been done by either of the former governments or its officers could have added to the strength or validity of the title.

It is true that the court of private land claims held that there should have been a confirmation under the royal ordinance of 1754, and rejected the claim because there was no evidence of such confirmation, nor any evidence which would raise a presumption of a compliance with the ordinance. We cannot now urge that this was incorrect with the record as it then stood; but

later, after documentary evidence had been added showing possession and ownership certainly down to 1834, one hundred and six years after the making of the grant, and eighty years after the ordinance of 1754 was made, this court was unwilling to follow the court of private land claims on this point, and affirmed the judgment on a different ground, "but without prejudice to such further proceedings as petitioner may be advised to take," and distinctly refused to decide whether the grant was perfect or imperfect, and said, if the grant were perfect, there was no reason why the owner might not prosecute his claim in the territorial courts.

Sena v. U. S. 189 U. S. 242.

It is also true that the supreme court of New Mexico, in the present case, notwithstanding the opinion of this court, and in spite of the fact that there was other additional evidence, reverted to the opinion of the court of private land claims, which had been practically repudiated by this court, and, in apparent and professed conformity with the case in 7 Texas, 384, above cited, held the title imperfect for lack of compliance with the ordinance of 1754. But we respectfully submit that the supreme court of New Mexico is wrong in this position with the record of the case as now presented, and that the long-continued possession and assertion of ownership for more than a century, under the governments of both Spain and Mexico, raise a conclusive presumption of compliance with the ordinance of 1754, and must be considered as sufficient to put the title beyond question.

U. S. v. Chaves, 175 U. S. 520-24.

U. S. v. Pendell, 185 U. S. 196 to 200.

Certainly, at the time of the cession of New Mexico to the United States in 1848, nothing remained to be done, by the Mexican government, to make perfect the title.

The above-cited case of *U. S. v. Chaves*, is of special interest in this connection. There was no such clear, direct, complete evidence of a grant as is here presented. Two grants were involved, of which one was made to Antonio Gutierrez, in the year 1716, but there was no record or evidence of any delivery of possession, which this court has declared to be essential.

Van Reynegan v. Bolton, 95 U. S. 35.

No direct evidence of the making of the other grant was presented, but it was mentioned and referred to in deeds made in 1734 from which it appeared that title to the two grants had been united in Diego Borrego, who in 1736 conveyed to Nicolas Chaves. There was no further evidence of title or possession from this time until 1785, when the property appeared in the inventory of the estate of Clemente Gutierrez. Then many years later appeared deeds from heirs of Gutierrez to the grandfather of the claimant, Chaves, conveying the eastern part of the grants, while evidence was presented showing that there had been some similar conveyance to the Indians of Isleta for the western part of the grant. Possession was shown under these conveyances. The court had no difficulty in holding the titles to have been "complete and perfect at the date when the United States acquired sovereignty," notwithstanding the absence of evidence as to the original grants, and the lack of any connection between the original grantees and

the claimants, Chaves and the Pueblo of Isleta. In the present case, we have complete and indisputable evidence of the original grant, of the descendants of the grantee, of the acquisition of the title by plaintiff, and of continued possession under the grant.

It is certainly sufficient for plaintiff to show that the title was complete and perfect before the cession of New Mexico to the United States. There is absolutely no evidence introduced in the present case to show any imperfection or defect in the title. With the original papers in language which shows the giving of a title of the most absolute character,—quite equal to what we call a title in fee simple,—followed by indisputable documentary evidence of occupation and possession for more than a century, if the title has been in any way divested, the burden is on defendant to show it, and the presumptions are all in favor of its continuance.

Ownership and possession having been clearly shown in 1728, 1783 and 1834, it is to be presumed, in accordance with a well-established rule, that they continue unless their cessation is proved by evidence, and the burden of proof is upon him who disputes their continued existence.

Lazarus v. Phelps, 156 U. S. 205.

Gray v. Finch, 33 Conn. 513.

Leport v. Todd, 32 N. J. L. 128.

Bayard v. Colefax, 4 Wash. C. C. 41-2.

Kidder v. Stevens, 60 Cal. 419.

Table Mountain Co. v. Wallers Co., 4 Nev. 220

Bates v. Pickett, 5 Ind. 22.

Lind v. Lind, 53 Minn. 51

Anderson v. Watt, 138 U. S. 706, and cases cited.

Adams v. Slate, 87 Ind. 575-6.

Sullivan v. Goldman, 19 La. Ann. 13.

Thomas v. Hatch, 3 Sumn. 182.

Clements v. Hays, 76 Ala. 280, 284.

Cargile v. Wood, 63 Mo. 514.

Gilleland v. Martin, 3 McLean, 491.

Higdon's Heirs v. Higdon's Lessees, 6 J. J. Marsh., 51.

O'Gara v. Eischenlohr, 38 N. Y. 299.

Best on Presumptions, 186.

There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty years since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence.

Wilkins v. Earle, 44 N. Y. 172.

In 1840 it was held by the court of Queen's Bench that a custom of the city of London proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence. It appears that evidence was given of its exercise from an early period down to 1689, but no proof of its having been exercised, or interfered with, at any later time.

Scales v. Key, 11 A. & E. 819, 824-5-6.

If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on

him who alleges a disseizin; and that burden remains on him, even after he has given *prima facie* evidence of a disseizin.

Syllabus in *Brown v. King*, 5 Metc., 173.

Currier v. Gale, 9 Allen, ~~252~~. 525

The plaintiffs, on the trial, having shown a clear documentary title to the premises in dispute, the defense rested solely on the claim of adverse possession. The burden of proof was, therefore, upon the defendants. It was incumbent upon them to establish the fact of adverse possession beyond a reasonable doubt.

Royland v. Updike, 28 N. J. L. 101.

Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it.

A status once established is presumed by the law to remain, until the contrary appears. (*See People v. Feilen*, 58 Cal. 218): or as a like rule is expressed, in the Code of Civil Procedure (*See Section 1963, sub-division 32*), "that a thing once proved to exist continues as long as is usual with things of that nature."

Kidder v. Stevens, 60 Cal., 419.

There is, however, in the present case, evidence on the part of the plaintiff of use and possession of the grant after the cession of the country to the United States, which evidence was not in the record when the former case was considered by this court, and this evidence is not contradicted by anything presented on behalf of defendant. It should be borne in mind that the

record shows that Juan Angel Leyba, to whom the title of the grant was conveyed in 1834, was killed by the Indians after his only son, Salvador Leyba, was born, and that Salvador must have been born about 1839. (*Record*, pages 52-3). It is also shown, by the same witness, that Salvador Leyba was raised by his aunt, Josefa Leyba, and evidence was offered to show that in 1855 Josefa Leyba made a sort of informal pledge of the grant to Jose M. Pino, for the payment of money loaned. (*Record*, page 74). Acts of dominion and ownership and use of the land were also shown by the evidence. (*Record*, pages 166-7-8).

Mention is made of this evidence to show that the present record is different from that which was submitted to this court in the former case; but in this action at law these considerations cannot be seriously operative, because it can be safely asserted that a complete legal title to land once vested cannot be lost by a mere failure to occupy the land or to retain visible possession of it. It is well settled that failure to use and occupy land never divests the owner of his title. Something more is necessary before he can be deprived of his ownership, and this is quite as true under the Spanish law as under our own.

1 *Morcan and Caletton's Partidas*, 400, 365.

Philadelphia v. Riddle, 25 Pa. St., 263.

3 *Washburn on Real Property*, Chap. 2, Sec. 1.

Robie v. Sedgwick, 35 Barb., 329.

Pickett v. Dowdall, 1 Wash. (Va.) 115.

1 *Escriche*, page 6 (Ed. of 1847).

SECOND.

The evidence clearly identifies and locates the boundaries.

The district court directed a verdict in favor of defendant, on the ground that the southern and western boundaries were imperfect. (*Record*, page 172). Therefore, it becomes necessary to examine the evidence as to boundaries with some care to demonstrate the error in this holding, although the supreme court of New Mexico did not follow it, and it is not unfair to assume that that court was unwilling to put its affirmance on this ground of imperfect boundaries, only because it was convinced that it was not sustained by the evidence. The impression made on the mind of a trial judge by evidence during a long and complicated trial, may often be found to be wrong upon a careful review of the record when the evidence has been transcribed in full from the stenographer's notes.

Reference to the original grant will show that the boundaries originally given are—

on the east, the San Marcos Road;

on the south, an arroyo called Cuesta del Organito;

on the west, lands of Juan Garcia de las Rivas;

on the north, lands of Sebastian de Vargas.

In the will made by the son of the grantee, in 1783, the northern boundary is given as the road which goes towards Pecos from Cerrillos, or lands of the Captain Sebastian de Vargas, while the western boundary is given as lands of the old Pueblo of the Cienega, and in the deed made in 1834, by the grandson of the

grantee, the western boundary is given as in the will made by his father, in 1783.

It does not seem necessary to take up any time in the discussion of evidence as to the northern and eastern boundaries. There is no dispute or question made about them. We will, therefore, under this heading, take up the evidence only as to west and south boundaries. Before proceeding to do so, the attention of the court is invited to the map which appears opposite page 158 of the printed record, and to the fact, in connection therewith, as shown by defendant's pleas, on page 9 of the record, that all of the land occupied by defendant is in section twenty-one to the south of the grant shown on the map as "Cerrillos Grant," which covers less than one-fourth of that section. The location of the land claimed by defendant should be kept in mind throughout the whole consideration of the case.

That the statement of the west boundary in the petition for the grant, is sufficient, is supported by authority.

Land Co. v. Saunders, 103 U. S., 318 to 323.

West Boundary.

As has been stated, the west boundary in the original grant, is the land of Juan Garcia de las Rivas, and in the two later papers of 1783 and 1834, it is given as the land of the old pueblo of Cienega. It appears from the documentary evidence, that the statement in the later papers is in no way a variation from that in the original grant. Plaintiff's exhibit "B" is one of the original archives from the office of the surveyor general, and is a deed from Joseph Castellanos to Miguel Garcia de

las Rivas, dated August 12, 1701, and is a transfer of the sitio of the old pueblo of the Cienega, which appears to have been granted by Diego de Vargas to Bernabe Jorje (*Record*, page 34). Following this, plaintiff's exhibit "C" is a deed from Miguel Garcia de la Riba to his son, Juan Garcia de la Riba, dated March 12, 1704, conveying the same property which he had purchased from Joseph Castellanos, and in this deed, the boundaries of the sitio of the old pueblo of the Cienega are set out, the eastern boundary being the Penasco Blanco de las Golondrinas. (*Record*, page 36).

These two deeds plainly show that the lands of Juan Garcia de las Rivas, and the lands of the old pueblo of the Cienega, are the same, and, made as they were, many years before the grant of 1728, there can be no question as to their competency to establish and identify the western boundary of the Leyba grant.

Owen v. Bartholomew, 9 Pick., 525.

Morris v. Callanan, 105 Mass., 129, 132.

The second of these two deeds came from the possession of Nasario Gonzales, a large land-owner at Cienega, and was identified by Andres C. de Baca (*Record*, pages ~~35~~^{35b}) as having been in the possession of Gonzales as far back as 1884 or 1885. This witness also states that he is well acquainted with the boundary calls set out in this deed, including the Penasco Blanco de las Golondrinas, the eastern boundary of the old Pueblo grant, which, as the records show, was, at the time of the making of the Jose de Leyba grant in 1728, "lands of Juan Garcia de las Rivas." (*Record*, page 36.38.) He also states that plaintiff's map, (*Record*, op-

posite page 50) shows with approximate accuracy the location of the Penasco Blanco. (*Record*, pages 39-40.) Further, this witness, (*Record*, page 69) locates the Penasco Blanco on the United States government map, the same having been marked thereon by the government surveyor. He also, on cross-examination, (*Record*, pages 70 to 74), shows his perfect familiarity with the natural land-marks and localities in that section of the country, having previously stated that he had known them since he was nine or ten years old. (*Record*, page 38).

Felipe Pino testifies that he is acquainted with the Penasco Blanco, and that the turquoise mines operated by the defendant, would lie to the east of a line drawn south from that Penasco. (*Record*, page 56.) On cross-examination the witness fixes the location of the Penasco Blanco. (*Record*, page 60.)

Diego Mares, a witness for the defendant, is acquainted with the Penasco Blanco, a well known landmark. (*Record*, page 124.)

Alejandro Montoya, defendant's witness, is well acquainted with the Penasco Blanco, and has seen the ruins of an old Pueblo at Mesita Cienega. (*Record*, page 129.)

Nasario Gonzales, 83 years old, whose deposition was read on behalf of defendant, testified (*Record*, pages 147-8) as follows:

Q. Did you ever hear down in that section of the country of lands called the lands of Juan Garcia de las Rivas?

A. No, sir.

Q. Did you ever hear the lands of the Cienega,

where you live, called the lands of Juan Garcia de las Rivas?

A. No, sir. I have numerous papers, very old papers, as far back as the conquest among them, and I did not find a single paper that mentioned any Garcia.

Q. Any Garcia de las Rivas?

A. No, sir.

Q. These papers to which you refer, did they relate to the lands of Cienega?

A. The lands of La Cienega.

Again, at page 150 of the Record:

Q. Did you ever hear anything about Juan Garcia de las Rivas ever having anything to do with the Sitio de Cienega?

A. *I never heard that said and there is no papers that shows that fact.*

A reference to the testimony of Andres C. de Baca, who made a copy and translation of it, (*Record*, pages 35-6) will show that plaintiff's Exhibit C, (*Record*, page 36), a deed for the lands of the Cienega to Juan Garcia de las Rivas, was in the possession of the witness Nasario Gonzales in 1884 or 1885, and must have been in his possession at the time he gave the foregoing testimony. Further comment on the testimony of Mr. Gonzales is deemed unnecessary.

Jesus Narvais, witness for defendant, whose deposition was read, states that he never heard of any such man as Juan Garcia de las Rivas, or that the lands of the Cienega were ever the lands of that person. (*Record*, pages 153-4.) A reading of all the testimony of this witness will show that he is not very well acquainted with the names of localities in the neighborhood of the Leyba grant. Had he been cross-examined, his ignorance would have been further exposed.

The foregoing summarizes all of the evidence about the Penasco Blanco, and, beyond all question, identifies and establishes it as the eastern boundary of the lands of Juan Garcia de las Rivas, and, consequently, as the western boundary call of the Leyba grant. Its position is shown on the map opposite page 50 of the Record, and, in accordance with the well known rule of surveying grants with such boundary calls, a north and south line must be extended from it to the south to form the east line of the Garcia land, and the west line of the Leyba grant, until it intersects an east and west line drawn from the southern boundary call.

Counsel for defendant urged, in the court below, that the west boundary is uncertain because the Penasco Blanco is outside of what plaintiff claims as the Leyba Grant, and the Penasco Blanco is the eastern boundary of the lands of Garcia de las Rivas, which constitute the western boundary of the Leyba Grant. The Penasco is one point on the eastern boundary of the Garcia lands, through which a north and south line being run, that line makes the eastern boundary of the Garcia lands. An examination of the map at page 50 of the record, will show that the Leyba Grant would reach a portion of that line were it not for the interposition of a part of the Cerrillos Grant,—a grant made in 1788, as will appear by reference to page 157 of the record, sixty years after the Leyba Grant was made, during all of which time, undoubtedly, the Leyba land actually touched, on the west, the Garcia land. At the present time, it is impossible to say whether there was an intentional disregard of the Leyba Grant in the making of the Cerrillos Grant in 1788, or not, and it is

possible that in surveying the latter grant, it may have been made to include more land than was originally granted, and in this connection, attention is called to the map opposite page 94 of the record, which shows a great difference between two government surveys of that grant. However that may be, it is worthy of note that the Cerrillos Grant was made five years after the death of Simon de Leyba, the only heir of the original grantee, and at a time when the owner of the Leyba Grant was a boy only eighteen years of age, as is shown by reference to the record of his baptism at page 47 of the record.

South Boundary.

The south boundary of the grant in the original petition, is an arroyo called Cuesta del Oregano. A cuesta is a slope or rising ground. Oregano means marjoram. The Coyote Spring, which is shown on the map opposite page 50 of the record, is identified by almost every witness who testified concerning it, and it is to be noted that the will of Zimeon Leyba, made in 1783, declares that it is made at the Coyote Spring, and further contains the statement that within the grant, which is described in the will, on page 46 of the record, there is constructed a ranch at the Coyote Spring. Thus, it is made plain that the place at which should be found the southern boundary of the grant, must include the Coyote Spring, and south of that spring we must look for the Cuesta del Oregano, or the arroyo of that name. Positive evidence presented by plaintiff is to the effect that Coyote Spring is in the Arroyo del Oregano and that the cuesta is on the other side of that arroyo.

Andres C. de Baca testifies that he knows the Coy-

ote Spring, (*Record*, page 42) and thinks that it is correctly shown on plaintiff's map found at page 50 of the record.

Felipe Pino testifies that he is sixty-six years of age, and knows the Coyote Spring; that it is situated in an arroyo called the Arroyo del Oregano, lies south of the road from Cerrillos to Pecos, and that he first visited the spring many years ago, and then saw ruins of houses there. (*Record*, pages 55-6, 61.)

Brigido Gabaldon, 69 years of age, testifies that he knows the Coyote Spring; first saw it about 53 years ago, and that it is situated in the edge of an arroyo called the Arroyo del Oregano with hills on each side of it. (*Record*, pages 62-3.)

Eligio Sedillo, aged 75, testifies that he has known the Coyote Spring since 1853, and knows the San Marcos Spring; that the Coyote Spring is situated in an arroyo called "Arroyo del Poleo"; that he knows the Cuesta del Oregano, and it is in front of the Coyote Spring towards the San Marcos Spring; that he knows the arroyo of La Cuesta del Oregano, and that it is south from the Coyote Spring. (*Record*, pages 81-2.)

The testimony of this old man as to the location of the Arroyo of the Oregano is not inconsistent with the testimony of the other witnesses, as that arroyo extends to the southwest of the spring and bears that name until it is joined by the Arroyo de las Gallinas. Below that junction it is known as the Arroyo de la Piedra, identified by many witnesses both for plaintiff and defendant. Sedillo locates the cuesta (slope) of the Oregano in front of the Coyote Spring, and towards the San Marcos Spring. The words "in front of" are

clearly a literal translation of the Spanish "en frente de," and would be better rendered into English as "opposite to." There does not appear from the testimony or the map, to be any other arroyo or slope between the two springs. The Arroyo del Poleo, which no other person appears to have heard of before, may be the affluent of the Arroyo del Oregano shown on the map. While the word "poleo" is given by the interpreter as "weed," (*Record*, page 82) its true meaning in English is "penny-royal." Oregano is the Spanish word for marjoram, and this aged witness may have confused the two herbs, but it is certain that he is informed of the existence of an Arroyo del Oregano in that immediate vicinity. He also locates the cuesta or slope of the Oregano as being in front of, or opposite to, the Coyote Spring, meaning thereby that it comes down to the arroyo in which the spring is located; and the natural inference would be, that the arroyo at the bottom of the slope would bear the same name, there being no other arroyo in the vicinity lying at the foot of such a slope.

Edward F. Bennett, a witness for defendant, testifies that he has never heard of the Cuesta or the Arroyo of the Oregano, but that the Coyote Spring is located in the Coyote Arroyo. (*Record*, pages 97-8.) There is nothing strange about this negative testimony, in view of the fact that the witness states that he speaks very little Spanish, and is not acquainted with Mexican names, (*Record*, page 96) and that he was not at this spring very often, as it was outside of where he was prospecting. (*Record*, page 100.) He says that he has never heard of the Arroyo de la

Piedra, (*Record*, page 102) an arroyo well known to all the Mexican witnesses. He states that he has never heard of the Jose de Leyba Grant, nor has he ever heard of the Sitio de los Cerrillos, a confirmed land grant located in the immediate vicinity of where he has been living for the last 26 years. (*Record*, page 104.) He positively locates the cuesta or slope, however, (*Record*, page 103.) "But the names given by the Mexicans down there I don't understand as well as I do up in the district proper." (*Record*, page 103.)

Michael O'Neil, a witness for defendant. It is quite evident from the testimony of this witness that he knows nothing whatever as to the location of the Coyote Spring. His testimony is so flatly contradicted by other witnesses for the defense, that it is entitled, on this point, to no consideration whatever. He testifies that he has known this spring since 1880, (*Record*, page 111) and states positively that it would be impossible to drive a team of horses across the arroyo at the spring, because there are points where it is from 75 to 150 feet in height. (*Record*, page 116.) This remarkable statement is contradicted by the other witnesses for the defendant, Mares at pages 123-4, Montoya at page 128, and Muniz at pages 132-3. Witness further testifies that he has known the arroyo in which the spring is situated, as "Coyote Canon," and that Andres C. de Baca gave him that name. Mr. Baca (*Record*, page 169) testifies that he could not have told O'Neil that, because he has never know the place by that name, and that there is no such canon in that section of the country. O'Neil says that he has never heard of the Cuesta or Arroyo of the Oregano, nor has

he ever heard of the Jose de Leyba grant. There is nothing surprising about this negative testimony, because, as above shown, he evidently does not know the location of the Coyote Spring; never heard of the Arroyo de la Piedra, (*Record*, page 116) which is, in fact, the water-course which he calls Coyote Canon; never heard of the Sitio de Juana Lopez, and the Sitio de los Cerrillos, two confirmed land grants located in the immediate vicinity of where he has been living for the last twenty-seven years, (*Record*, page 118) or the names of other natural objects; speaks very little Spanish; (*Record*, page 118), is not familiar with Spanish names, and there are a great many names "I get mixed up in." (*Record*, page 117.)

Diego Mares, witness for defendant, never heard of the Cuesta or Arroyo of the Oregano. (*Record*, page 121.) He locates the Coyote Spring and the Arroyo de la Piedra correctly, (*Record*, page 123) and describes a "cuesta" at the spring. (*Record*, page 124.) As in the case of O'Neil, this witness has never heard of the Jose de Leyba grant, nor has he ever heard of three confirmed land grants, the Cerrillos, the Sitio de los Cerrillos, and the Sitio de Juana Lopez, which lie almost at the front door of his residence. (*Record*, page 124.)

Alejandro Montoya, witness for the defendant, knows the Coyote Spring, but has never heard of the Arroyo or Cuesta of the Oregano. (*Record*, pages 126-7.) He locates the spring correctly, although not very clearly, (*Record*, page 128) and while he has been living next door to them for many years, he has never heard of the confirmed land grants of the Sitio de los

Cerrillos, Sitio de Juana Lopez, Los Cerrillos, or Sebastian de Vargas. (*Record*, pages 128-9.) ~~Is it~~ wonderful that he never heard of the Jose de Leyba grant?

Pedro Muniz, witness for defendant, testifies that he is acquainted with the Coyote **S**pring, but never heard of the Cuesta or Arroyo of the Oregano. (*Record*, page 130.) He was at the spring twice, and on those occasions merely passed by without even stopping to get a drink. (*Record*, page 132.) The testimony of this witness is purely negative in that he never heard of the cuesta or arroyo of the Oregano, and is of no value as to the spring, except as a direct contradiction of the testimony of Michael O'Neil.

Nasario Gonzales, whose deposition was read in behalf of the defendant, knows the Coyote Spring, but has never heard of the Arroyo or Cuesta of the Oregano. He testifies at page 147 that "There is not even a slope there. A cuesta I call a place where you go up the slope, but there is no cuesta there; there is nothing." This statement is directly and positively contradicted by a number of the witnesses for defendant. As a sample of the reckless evidence of this witness, after stating that he had been the owner of the San Marcos grant, he says, at page 149, "The waters of the Coyote Spring are within the grant of San Marcos." A glance at plaintiff's map, page 50, and the government plat, next before page 95, will show the falsity of this statement. The untrustworthy character of the evidence of this witness has been commented on, under the heading of "West Boundary."

Jesus Narvais, an old Cochiti Indian who could neither read nor write (*Record*, page 152), says that

he knows the Coyote Spring, and that the land is hilly in the neighborhood of the spring. (*Record*, page 152.) He testifies that he never heard of the Cuesta or Arroyo of the Oregano (*Record*, page 153), nor of the lands of Juan Garcia de las Rivas, and his testimony generally as to the names of localities indicates, as he expresses it, "I do not understand very much about these matters." (*Record*, page 154.)

The depositions of Gonzales and Narvais were taken without opportunity for cross-examination.

It will be seen that all there is to the evidence of the defense, which has been quite fully set out, is of an entirely negative character only, and only as to the name of *Oregano*. The court is familiar with the established rule as to the relative value of positive and negative evidence, but in addition to this, attention must be called to the fact that nearly all of the witnesses of defendant show the existence of an arroyo in which the Coyote spring appears and of a cuesta or slope to the south of that spring. It is not too much to say that defendant's own witnesses point out clearly where the boundary must be when we take their evidence in connection with the existence of a ranch at the Coyote Spring, within the grant, shown by the will of 1783 and the deed of 1834. In other words, while defendant's witnesses profess ignorance of the name of *Oregano* as applied to an *arroyo* or *cuesta*, yet they fully agree with plaintiff's witnesses as to the existence of an arroyo and a cuesta at the place which other evidence indicates as the correct location of the southern boundary of the grant.

It is beyond all possibility of question or dispute that

the arroyo and cuesta del Oregano existed in 1728 when Jose de Leyba petitioned for the grant; that they existed in 1783 when Simon de Leyba mentioned them in his will, and that they existed in 1834, sixty-one years later, when Salvador Antonio Leyba mentioned them in his deed to Juan Angel Leyba. There can be no doubt, that these objects must still exist. Witnesses for plaintiff say they do exist and that they know them by name. Against this, witnesses for defendant say, in effect, that, while such objects do exist and at the right place as designated by witnesses for plaintiff, yet they do not know them by the name of Oregano.

In a Kentucky case, from the opinion, which is quite apposite, it appears that there was an entry for "eight thousand acres on Woolper's creek, about eight miles below the Big Miami, to begin about one and a half miles from the mouth of the creek." The court after stating that the creek claimed was sometimes called by the name of Stoney, proceeds as follows:

From these facts it is apparent, that before and about the date of the entry in contest, the stream upon which it lies was sometimes called and known by the name of Woolper, and that it probably derived its name from the fact that a man by that name held the aforesaid claim upon it.

And this conclusion is strengthened by the consideration that it, for many years past, has gone and now goes by that name. Upon the whole, we are satisfied that, about the time the entry in question was made, it was sometimes called by the one and sometimes by the other name. This circumstance, as it seems not to have been generally known by the name of

Woolper, at the date of the entry, might be delusive to the subsequent locator, and would render the entry bad, if there had not been other objects of notoriety called for, and such description from them, as would enable him to find this creek, and to know with reasonable certainty that it was the one intended.

An object of notoriety is given; namely, the Big Miami, a large stream notoriously known by that name, emptying into the Ohio, the great highway upon which persons most generally traveled in emigrating to this country. And as the entry must lie in Kentucky, and calls for lying about a mile and a half from the mouth of Woolper, which is called for as a creek about eight miles below the Big Miami, the subsequent locator must reasonably have concluded that Woolper emptied into the Ohio below and on the opposite side from the Big Miami. He would, therefore, set out first to find the mouth of the latter stream, as the point approaching in all reasonable likelihood, nearest to the mouth of Woolper, and as the point intended by the call for the Big Miami. Arriving at the mouth, and measuring by the meanders of the Ohio (which, as has been settled by this court, is the proper way to ascertain distances upon it), at the distance of only ninety poles over eight miles, he would find the mouth of a creek of considerable size, emptying into the Ohio; and, upon further search, he would find no other creek emptying into the Ohio for several miles above and below. He could not doubt that the creek found was the one intended, and especially when, upon further search and inquiry, he could find or hear of no other creek at all in the neighborhood, bearing the name of Woolper.

Thruston v. Masterson, 9 Dana., 229-30.

The applicability of what is set out in the last sen-

tences of the foregoing quotation is obvious. In the present case it is shown beyond all possibility of doubt that the Coyote Spring and the ranch house at that spring, where Simon de Leyba made his will in 1783, which are referred to in the deed made by Salvador Antonio Leyba in 1834, must be within the grant, and that therefore the southern boundary must be looked for so as to include the Coyote Spring. The identification of the southern boundary depends upon finding an arroyo and a cuesta. All of the witnesses familiar with the country, except Nasario Gonzales, testify to the existence of an arroyo, and of a cuesta south of the arroyo, going up hill towards the San Marcos Spring. Witnesses for the plaintiff identify this arroyo and this cuesta by the name of Oregano, while witnesses for the defendant did not know those objects by that name. There is no evidence presented of any other arroyo or cuesta corresponding to the requirements of the documentary evidence. There can be no more doubt of the identification of this boundary than there was in the Kentucky case that the creek found was the one intended when there was no other to be found in the neighborhood bearing the name given in the entry of the land. In our case no other arroyo or cuesta can be found anywhere in the neighborhood bearing the name of Oregano.

THIRD.

Even if there were doubt about the location of the boundaries, the title would not be thereby affected.

The position taken by the district court, but, as

should be stated in justice to the judge of that court, without having heard counsel on the point, was that the western and southern boundaries were imperfect, and that therefore, the grant was not perfect, and not being a perfect grant, that the plaintiff had no title. We do not concede for a moment that there is any uncertainty or imperfection about these boundaries, but, if there were, it would not affect the title. Where there is any uncertainty or difficulty about the location of boundaries, that merely makes a question of fact to be passed upon by the jury, but in no case has it ever been thought that any such uncertainty or difficulty in any way impaired the title.

- Wilson v. Marvin*, 172 Pa. St., 37.
Bushey v. Iron Co., 136 Pa. St., 555.
Berry v. Watson, 122 Pa. St., 227.
Kellum v. Smith, 65 Pa. St., 89.
Greeley v. Thomas, 56 Pa. St., 43.
Brown v. Willey, 42 Pa. St., 208.
Hunt v. McFarland, 38 Pa. St., 71.
Mathers v. Hegarty, 37 Pa. St., 64.
Gratz v. Hoover, 16 Pa. St., 239.
Nourse v. Lloyd, 1 Pa. St., 233.
Comegys v. Carley, 3 Watts., 280.
Schei v. Struck, 109 Wis., 598.
Woodbury v. Venia, 114 Mich., 252.
Brown v. Morrill, 91 Mich., 29.
Tasker v. Cilley, 59 N. H., 575.
Ayers v. Watson, 143 U. S., 599 to 609.
Abbott v. Abbott, 51 Me., 575.
Cullacott v. Cash Co., 6 Pac. 214.
Madden v. Tucker, 46 Me., 376.

Carter v. Clark, 92 Me., 226.

Boardman v. Reed, 6 Pet., 345.

Barclay v. Howell, 6 Pet., 509-10.

Thruston v. Masterson, 9 Dana. (Ky.) 228.

Smith v. Evans, 1 Ky. (Hughes) 169.

We venture the assertion that no case can be found indicating that difficulty in identifying boundary calls in a conveyance, has been treated as in any way affecting or impairing the title to the property. The district court may have had in mind some such doctrine as that announced by this court in a California grant case. In that case, it will be seen, however, that one boundary was entirely absent. An examination of everything set out by the court will show that the only boundaries specified were the northern and southern boundaries of a tract of land on the sea-shore with the sea to the west. The eastern boundary was not given, and we quote from the decision of the court as follows:

Now the grant on which the appellant's counsel relies as conferring perfect title is not the certifying document above referred to, but the previous act of directing possession to be given to Peralta, and the actual delivery of possession to him. It is perfectly manifest that Peralta could not have been put into manual possession of several leagues of land. He could only have been put into possession of a certain part or parts in the name of all; and the exterior boundaries of the tract must have been indicated by language or monuments. But we have no evidence of any description of boundaries, or monuments to designate them, except the bay on one side, and the extreme limits of the tract along the bay. The interior line between those limits is entirely wanting in all the documents thus far presented. The title relied on, therefore, is necessarily imperfect, and

requires some authoritative survey to distinguish what was intended to be granted from what remained in the public domain.

* * * * *

Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the *rancho*. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace or where it did run is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should run, in order to separate the *rancho* from the public domain. But it cannot make that title perfect which was not perfect before.

The supreme court of California, in *Banks v. Moreno*, 39 Cal., 239, 240, well observed:

"The precise point under discussion is, whether or not the title of Peralta, as exhibited by the plaintiff, was a perfect title conveying the fee, and which invested him with absolute dominion over a specific parcel of land without any further action on the part of the United States; or whether, at the time of the cession of California, something remained to be done by the government which was necessary to invest Peralta with a complete legal title to the specific tract.

"In every complete grant conveying a perfect title it is essential that the thing granted be sufficiently described to enable it to be identified. In grants of real estate it is not always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well known name, and the boundaries of the tract known by that name are notorious and well de-

finer, a grant of the tract by its name would, doubtless, convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises—would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by aid of the descriptive portions of the grant. But it is equally certain that, to constitute a complete and perfect grant to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions—not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed.”

We certainly concur in these views and, therefore, hold that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties.

Carpenter v. Montgomery, 13 Wall., 493-4.

From the foregoing quotation, it will be seen that the court was considering a similar question to the one presented here—that is, as to whether the title relied on by plaintiff was a perfect title. As announced by the court, all that is necessary is that the land “be so described that the particular tract intended to be granted can be identified with reasonable certainty.” Certainly, the description set out in the Leyba grant is

such that the land intended to be granted can thereby be identified with reasonable certainty, and beyond all doubt it has been in this case so identified, and clearly and necessarily includes the land claimed by defendant, which is far within the boundaries of the grant, no matter what view is taken of the evidence. The court should have directed a verdict for plaintiff.

FOURTH.

Defendant offered no evidence of ownership, or of claim under color of title.

The defense of the statute of limitations set up by defendant is made under the statute of New Mexico, which reads as follows:

No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against anyone having adverse possession of the same continuously in good faith, under color of title, and who has paid the taxes lawfully assessed against the same, but within ten years next after his, her or their right shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued.

Session Laws of New Mexico of 1899, page 133.

Defendant, however, not only pleaded what the statute requires, but in addition, that it was the owner of the property sued for. The only claim of right made by defendant is under certain mining locations made at different times, for none of which have patents ever

been issued, and it is obvious that no locations of mining claims under the public land laws can give ownership of the land or anything more than the right of possession as long as the locators continue to comply with the federal and local mining laws and regulations.

As to color of title, it will be sufficient to quote the authoritative definition heretofore given by this court, which is as follows:

The courts have concurred, it is believed, without an exception, in defining "color of title" to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith.

Wright v. Mattison, 18 How., 56.

Certainly, within this definition, it cannot be said that a mining location constitutes color of title, and color of title is absolutely necessary under the New Mexican statute above quoted. When a person makes a mining location he clearly recognizes title to the land in the United States, and what are known as mining deeds transferring such claims all necessarily contain the same recognition. It cannot be said that any such locations or transfers are in appearance title, although in reality no title.

Under defendant's plea, if the evidence does not show ownership, or adverse possession under color of title, certainly no defense has been made under the statute.

An additional requirement of the statute, which is

also pleaded by defendant, is that the party setting up such a defense must have paid the taxes "lawfully assessed" against the land, which evidences the legislative intent not to make the statute applicable to the possession of lands of the United States which could not be lawfully taxed by any one. No evidence was offered or could have been offered, to show the payment of any taxes on the land, all that there is in the record where defendant attempted to meet this requirement of the statute, being found at page 164, from which it appears that the land had never been assessed because mining claims are exempt by the laws of the Territory, as stated by counsel for defendant.

FIFTH.

The evidence of mining locations and of claim thereunder, offered to support the defense of adverse possession, was incompetent.

The possession, claim and occupation set up by defendant are based entirely upon locations made under the mining laws of the United States, and upon nothing else. This should be kept in mind throughout the discussion.

Our statute, hereinbefore quoted, bars any action for lands "against any one having adverse possession of the same continuously in good faith, under color of title, and who has paid the taxes lawfully assessed against the same," except within ten years after the cause of action accrued; and the statute further declares, in effect, that all suits for the recovery of land so held "shall be commenced within ten years next after the cause of action therefor has accrued."

Laws of 1899, Chap. 63, Sec. 2.

It may be questioned whether there is any limitation as to actions for the recovery of lands not "so held,"—that is, in the manner described in the earlier part of the section, but that is quite aside from the present argument, the object of which is to show that land cannot be "so held" under mining locations.

In a case which came up to this court from the circuit court of the district of Nebraska, it is stated that there was no state statute regulating or defining title by adverse possession, but that there was a statutory provision that an action for the recovery of land could be brought only within ten years after the cause of action had accrued. The case is interesting and instructive because it shows that even under such a statute as that of Nebraska, adverse possession by the defendant is necessary, and the character of such adverse possession is quite clearly defined. The court quotes approvingly from decisions in a number of states, and shows in substance that adverse possession to be effectual must be "the open, actual, exclusive, notorious and hostile occupancy of the land, and claim of right, with the intention to hold it as against the true owner and all other parties." The court then says:

Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title.

Ward v. Cochran, 150 U. S., 608.

It will be noticed how carefully the court indicates that the possession must be not only exclusive of the true owner, but of all others, and, as will be hereafter seen, any admission or recognition by the would-be adverse possessor, of title in any one else than himself, destroys the exclusive character of the possession, which is essential to the validity of the defense. It must be perfectly apparent in the present case that defendant has steadily and consistently taken the position that the title to the land in dispute was in the government of the United States. It has never asserted title to the land in itself. Even after the beginning of the present action, defendant filed an answer distinctly setting out that it was in possession of the land sued for, under the mining laws of the United States, by virtue of various locations, which are specified and referred to in the pleading. The claim of right or title or ownership which the authorities, with but few exceptions, hold to be necessary, is here entirely lacking.

In an Oregon case, suit was brought by a plaintiff who had title derived from a grant made by act of Congress, to aid in the construction of a road, the company constructing the road having filed its selection list, including the lands in controversy, on September 16, 1886, which selection was not approved until January 24, 1894. Defendant relied upon the statute of limitations, and showed that he went into possession of the land in October, 1886, and continued therein until the action was begun, January 31, 1898. The court discusses the case upon the theory, without actually deciding, that the legal title passed from the government September 16, 1886. It is clear that if

the title did not pass until 1894, there could not have been the necessary ten years' possession, as the statute would not run against the government. It appeared that the defendant had insisted that the land was government land, and that he made attempts to get title from the government, under the homestead laws. The trial court instructed the jury that the defendant might admit that the United States or the state was the owner, and, at the same time, hold adversely to the plaintiff, and, by so holding for ten years, acquire title as against the plaintiff. In other words, defendant's possession might be sufficiently adverse to bar the plaintiff, although defendant did not claim the ownership, but only a right to obtain a title from the government under its public laws.

It will be seen that this Oregon case presents almost the identical propositions involved in the present case. The opinion discusses the whole subject at great length, especially citing and considering the few cases to be found opposed to our view, thus fully presenting the whole controversy, and holds as we now contend that such a possession does not meet the requirements of law. The case must be read and studied as a whole, and no attempt will be made to make quotations from it.

Altschul v. O'Neill, 35 Oreg., 202; 58 Pac., 95.

We must not be understood as asserting that a mining claim is not property. Our position is that a duly perfected mining claim gives no title whatever to the land, but only a right to the possession of the land; and he who sets up any rights under a mining claim, precludes himself from asserting in himself any own-

ership of the land. A brief quotation from an opinion of this court will make this plain:

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. (*Forbes v. Gracey*, 94 U. S., 767, XXIV, 314.) There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the title, acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted, 13 Stat. at L., 441, Ch. 67, Sec. 9; R. E. Sec. 910, that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Belk v. Meagher, 104 U. S., 283-4.

It requires no argument to point out that were it not for the statute last referred to in the above quotation it would not be possible for the locator of a mining claim successfully to maintain ejectment against an intruder, because the locator would have no title upon the strength of which to recover, and the

defendant could defeat the action by showing that title was in the government. The right of possession has been separated from the fee, and any man who claims the possession under a mining location, necessarily cuts himself off from all possible chance, when he comes in conflict with a plaintiff claiming under a title good against the government, and not emanating from the government, from asserting that he has any possession adverse, exclusive and hostile to the whole world.

In *Altschul v. O'Neill*, 35 Or., 202; 58 Pac., 95—a case decided before the enactment of the Code of Alaska—upon a careful and well-considered view of the authorities, it was held that to constitute adverse possession there must be, among other requisites, an entry under claim of right hostile to the true owner and to the world, and that an occupant of land cannot hold adversely while he admits the title to be in the United States; thus adopting the doctrine of the United States courts in *Ward v. Cochran*, 150 U. S., 597; 14 Sup. Ct., 230; 37 L. Ed., 1195; *Henshaw v. Bissell*, 18 Wall., 255; 21 L. Ed., 835; *Bracken v. Union Pacific Ry. Co.*, 75 Fed., 347; 21 C. C. A., 387, and *Pillow v. Roberts*, 13 How., 472; 14 L. Ed., 282, in which it was said that possession, in order to be adverse, must be adverse to all the world. We are compelled to hold, therefore, that there was no possession of the disputed premises adverse to the plaintiff in error prior to the date of the issuance of the patent to its mining claim.

Tyce Consol. M. Co. v. Langstedt, 136 Fed., 128.

It was not the mere occupancy or possession which must be known to the true owner to prejudice his rights, but its adverse character. (*Alex-*

ander v. Polk, 39 Miss., 737.) It must also be under claim of ownership of the land. (*Magee v. Magee*, 37 Miss., 138; *Davis v. Botzmar*, 55 Miss., 671; *Wilkerson v. Eilers*, 114 Mo., 245.) And as the presumption must be indulged that Foster held in subordination to, and not adversely to, the true owner, it devolved upon plaintiff to show that his possession was adverse, and under claim of ownership. The possession was, we think, of such extent and character, and so open and notorious and inconsistent with, as well as injurious to, the real title, as to raise the presumption of knowledge thereof on the part of the true owners, and the sale of the land and improvements tended to show that the possession was under claim of ownership to the land. But defendant testifies that when he bought Foster's claim "he thought it was government land, and that he intended to make a homestead of it, if it suited him; that he did not find out that it was not government land for three, and maybe four, years after he bought it;" thus showing beyond any and all question that he did not at that time claim the land adversely to the true owner, and did not do so until after he ascertained that the land was not government land, and not subject to be homesteaded, and he then homesteaded another tract. There was therefore no evidence showing that defendant had been in the adverse, open, notorious and continuous possession of the land under claim of ownership for the period of ten years before the commencement of this action, which was necessary to bar plaintiff's action.

Hummelwell v. Burchett, 152 Mo., 611.

The defendants show a continuous possession of the premises, open and notorious, since 1851, but that possession has not been, in my judgment, during this period, or for twenty years, adverse to the title of the plaintiff. To render a possession adverse it must be hostile in its origin, and

hostile in its continuance. The entry upon the premises must be made, and the possession must be accompanied with the claim of the title against the whole world. In other words, the occupant must assert ownership in himself. An entry by permission of another, or, with an admission of another's title, will not set the statute running, and the recognition of another's title after the statute has commenced running, at any time within the twenty years, no matter for how brief a period, will destroy the continuity of the hostile possession, and avoid the bar of the statute.

In the present case Pettygrove, the party through whom the defendants derive whatever interest they possess, went into possession not claiming title in himself, but asserting, as was the fact, that the title was in the United States; and neither he nor his grantees have at any time since pretended that the fact was otherwise, or that they have ever acquired that title.

Adams v. Burke, 1 Fed. Cas., 99.

The third and last instruction given at the instance of plaintiffs, had reference to the question of adverse possession, in its relation to the Statute of Limitations. Its purport was that if plaintiff's title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, without title or claim, or color of title, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto. We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the government, or in some one deriving title from the government, state, or national. Any one in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title. Such is the

rule given as recently as 1854, by the Court of Appeals of Virginia, in the case of *Kincheloe vs. Tracewell*, 11 Gratt., 605. The court there says: "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title." *Harvey v. Tyler*, 2 Wall., 349.

The decisions of the court have determined the character of the possession which will thus bar the right of the former owner to recover real property. It must be an open, visible, continuous and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants.

Sharon v. Tucker, 144 U. S., 541.

See also:

Probst v. Presbyterian Church, 129 U. S., 190-1.

Jackson v. Porter, 13 Fed. Cas., p. 238.

Bowman v. Lee, 48 Mo., 336.

Bracken v. Railway Co., 75 Fed., 349.

Colvin v. Land Assn., 23 Neb. 75.

Smith v. Burtis, 9 Johns., 180.

Bedell v. Shaw, 59 N. Y., 50.

Schleicher v. Gatlin, 85 Tex., 272.

Colvin v. Burnett, 17 Wend., 569.

In presenting this point for consideration of the court, counsel for plaintiff have not overlooked a recent decision of this court which at first glance might appear to be in conflict with our argument. That case was brought up to this court from the Supreme Court of Iowa and the person asserting title by adverse pos-

session of land covered by a railroad grant held his possession under a timber culture entry, and the state court held that there was nothing in the facts of the case to show that the entryman "was not acting in good faith and with the belief that he would acquire title under the land entry under the timber culture act," and this court said that it was not proper to disturb this holding. Further on, near the close of the opinion, it is made more plainly to appear that the decision of this court was in conformity to the general rule of following the construction given by state courts to state statutes.

Land Company v. Blumer, 206 U. S., 495-6.

In the present case no such reason exists for holding against the contention of plaintiff, as the courts of New Mexico have not given any such construction to the New Mexico statute, nor would such decision, if it had been made, be binding on this court as in the case of state decisions. Moreover, there is no resemblance between the wording of the Iowa statute and that of the statute of New Mexico, which we have already quoted. The Iowa statute, so far as material, being as follows:

Sec. 3447. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards except when otherwise specially declared:

* * * * *

7. Written contracts—judgments of courts not of record—recovery of real property. Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

Iowa Annotated Code of 1897.

Annotated

In addition to this there may be some distinction to be found in the fact that both parties to the Iowa suit were asserting title under the United States, while the plaintiff in this case takes the position that the United States never had any title to the land in question.

We venture to submit to the court that there is nothing in the decision in the Iowa case which can interfere with the court now giving as full consideration to our argument as though the Iowa case had never come to this court.

A still later case, which came from the Supreme Court of Nebraska, of a similar character, by implication, at least, recognizes the correctness of the argument which we make. In that case, also, this court affirmed and followed the judgment of the state court, and used the following language:

We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and, in any event, cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession.

Missouri Land Co. v. Wiese, 208 U. S., 249.

In the present case defendant has never claimed title, but has always, not only acknowledged, but positively asserted, a superior title in the United States.

SIXTH.

There was no evidence of actual possession for the statutory period.

The defendant has pleaded (*Record*, page 5) that it has had "continuous, exclusive, actual, peaceable, hostile and open possession" of the property for more than ten years before the beginning of the action. This is not sustained by the evidence. The mining locations in evidence, over plaintiff's objections, (*Record*, pages 83-4), the "mining deeds" offered, (*Record*, pages 84 to 88), the notices to hold and work (*Record*, page 88) and proofs of labor on mining claims, (*Record*, pages 89 to 93) show nothing as to "continuous, exclusive, actual, peaceable, hostile and open possession" pleaded by defendant. They prove nothing more than intention to secure and preserve a right of possession claimed under the United States statutes.

The evidence of actual possession must be sought elsewhere. The witnesses to prove such possession are Bennett, (*Record*, pages 99, 101, 102), McNulty, (*Record*, pages 105, 107, 108 and 119), O'Neil, (*Record*, pages 112, 113, 133, 134), Mares, (*Record*, pages 119, 120), and Muniz. (*Record*, pages 129, 130.) Of these, we assert that but one, McNulty, shows anything like possession of the kind required. At page 108 will be found his statement that he kept everybody off the property "from the first part of the year 1894." But the suit in the court of private land claims was begun September 27, 1899, (*Record*, page 11), and this action of ejectment was begun May 4, 1903, (*Record*, page 2).

Let us examine the evidence of these witnesses, of

whom, with the exception noted above, not one appears to give a statement of the kind of possession required.

Bennett, at page 99, says he worked on the Castilian claim in 1889 when Parmelee claimed it, but that he worked for another man who had a lease; that McNulty had been in possession since 1892 or 1893 "I forget the exact date;" that prior to 1892 "Parmelee was in possession of that Castilian mine at one time;" that he, Bennett, located the Muniz claim in 1889 and abandoned it; that later he and John Andrews relocated it, and later the Munizes located and worked it. He further says at page 101, that C. G. Storey was in possession of the Muniz and Castilian in 1888 and 1889 to 1893; and, being asked who were in possession of the five named claims, before McNulty came, at page 102, says Storey was the next before McNulty, and before Storey, the Parmalees were in possession of the Castilian and the ground where the Muniz is; there was a man named Callander there in the early eighties. No claim is made by defendants under Callander.

McNulty, who is in the employ of defendant, at page 105 says he first went to work for Storey; that he had done the assessment work on the claims for each year except one which was exempt; that he worked for Allen and Storey, and later for Andrews and Doty, who "were a company that Mr. Storey wrote me had charge of the property for the sale of stones, etc.," but who do not appear in defendant's claim of alleged title, (*Record*, pages 84-88); and that "they were the American Turquoise Company;" and finally, at page 108, he makes the statement previously referred to that he kept everybody off the property "from the first part

of the year 1894." At page 119 he adds that such possession as he had was under mining locations.

O'Neil, at pages 112 and 113, says that McNulty went to the mines in 1892; that before McNulty, Graves and Storey and Allen were there; that he, O'Neil, leased the Castilian from Marshall in 1880, and the next man there was Milton Parmalee; that the Gem mine first came to his notice in 1894, "by a man named Storey and Allen;" that he was at the Muniz claim the day the Munizes located it, and that he heard about the Morning Star about the same time as the Sky Blue, in 1894.

Mares, at pages 119 and 120, says he is acquainted with the Castilian and Muniz claims only; that Marshall worked the Castilian in 1880; that he does not know who worked it after Marshall; that McNulty was in possession or working them, "more or less" in 1893 or 1894; that Storey worked both the Castilian and the Muniz before McNulty came, "more or less about three years;" that the Munizes worked the Muniz claim before Storey worked it.

Muniz, at pages 129 and 130, testifies that he and his brother located the Muniz claim and worked it about a year when they sold it to Storey; that before 1890 he saw Cartwright and Parmelee work the Castilian, and Storey in 1890 and 1891; that he and his brother built a house on the Muniz claim, and after they sold, Storey, and after him, McNulty, lived in the house. The location was made January 31, 1890. (*Record*, page 83.)

The foregoing fairly summarizes all of the evidence of possession for defendant, and argument is unneces-

sary to show that it falls far short of what is required to establish title in defendant, or a bar to plaintiff's action.

SEVENTH.

Laches is no defense, and there is no room for the application of the doctrine of equitable estoppel.

Our excuse for the presentation of this point is the adverse ruling of the district court upon plaintiff's demurrer to defendant's third amended plea, (*Record*, pages 5-13, 18-20, 23), and the fact that defendant's counsel in the court below, seriously argued the converse of these propositions.

The substance, greatly condensed, of that plea, which itself covers a little over eight printed pages, has been set out in the "Statement of Facts" herein, and will not here be repeated. It is one of the most extraordinary pleas ever made in an action at law.

In the portion to which plaintiff's demurrer was addressed, the following faults, failures and neglects are imputed to plaintiff and his predecessors in title, and are set up as defenses to an action of ejectment:

They failed to avail themselves "of the beneficent provisions provided for their protection" in the act of Congress of 1854 and the regulations thereunder, by presenting a claim for their grant to the surveyor general;

They permitted "without protest, without objection and without notice" mines to be located, opened, "bought in open market" and to be mortgaged;

That "although the courts and offices of the Territory of New Mexico and of the United States were open to and invited" them, "and justice and

common fairness and honesty required," they did not assert their claims so as to apprise defendant;

That in 1895 plaintiff obtained a deed from descendants of the original grantee;

That in 1899 he filed a petition in the court of private land claims seeking confirmation of the grant and prosecuted the same, without success, in that court and in the Supreme Court of the United States.

The above resume of the pleaded wickedness of the grant owners, gives no idea of the picturesque, almost lurid, effect of the great amount of adjective language of the plea, and in that way, perhaps does the pleader some injustice, but it is sufficient for present purposes.

It should be noted that, under the act of 1854 and the regulations, both quite fully set out in the plea, it was in no way obligatory upon grant claimants to present their claims to any one, and the notice published by the Surveyor General (*Record*, page 8,) merely requested grant claimants to come in, although the act of Congress made it his active, positive duty "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico. (*Record*, page 5.) It is also to be remembered that in 1854 the owner of the grant, Salvador Leyba, was about fifteen years old, in the care of his aunt, Josefa Leyba, who appears not to have been able even to write her own name, (*Record*, page 74,) and in all human probability neither of them ever heard of the "beneficent provisions" aforesaid.

As to the assertion that the courts were open to them, this is incorrect as to the time prior to March, 1891, when the court of private land claims was cre-

ated and the eighth section of the act of 1854 was repealed.

Chavez v. Chavez, 7 N. M., 58, 79-80.

Chavez v. Whitney, 4 N. M., 611.

Tameling v. U. S. Co., 93 U. S., 644.

Comment does not seem necessary as to the other allegations.

The plea seems to be made up of a mixture of imputation of laches in not presenting a claim to the surveyor general, or in the courts incorrectly alleged to be open to claimants, and assertion of a species of estoppel because plaintiff or his predecessor in title did not come forward and prevent the location of mining claims on the grant.

We deny that plaintiff, or his grantor, has been guilty of any laches of which defendant has any right to complain, but we cannot admit that laches can be set up as a defense in an action which is essentially an action at law, although under the new procedure which now prevails over the greater part of the country, equitable estoppel may be urged, and, indeed, other equitable defenses.

First, as to the doctrine of laches, we assert that it is one peculiar to courts of equity and applicable only to equitable suits, and cannot be set up in actions at law as to which the legislature has prescribed fixed and definite periods of limitation. Laches on the part of the plaintiff may defeat his suit in equity without regard to any statute of limitations, but what would any court say to counsel who would gravely urge laches as a defense to an action on a promissory note, even though a code provided that equitable defenses may be

pleaded in all actions? The proposition is unthinkable, but it would be no more unreasonable than the attempt in the present case.

The position of defendant's counsel on this question, evinces what appears to be a confusion of ideas as to the effect of the reformed pleading and practice. It is contended that the code makes equitable defenses admissible in actions at law like the present one, and defendant's counsel appear to think that this transforms actions at law into suits in equity, and that they are to be decided by the application of equitable doctrines, without regard to the essential nature of the case. It requires but little reflection to perceive the fallacy of such a position. That which can be set up as an equitable defense to an action at law, under the code, must, necessarily, be of such a character as would have been sufficient prior to the adoption of the code, to invoke the interposition of a court of equity on behalf of the defendant, against the unrighteous prosecution of the action at law. No case can be found justifying such an interposition on the mere ground of laches.

Probably this is the first time that an attempt was ever made, in defense to an action of ejectment, to set up that the claim of a plaintiff is "in the catalogue of stale claims, against which the doors of a court are closed, independent of statutes of limitation," as was asserted by defendant's counsel in the supreme court of New Mexico.

We must not be understood as contending that equitable defenses may not be set up in actions of law. For the present, we are willing to concede the general proposition, although there is much reason to doubt its

correctness, that in New Mexico, now, such defenses may be made even in actions of ejectment although there can be no doubt that it could not be done when this action was begun and when the third amended plea and the demurrer thereto were filed. It may be well to quote the statutes. The statute as to ejectment, originally enacted in 1847, except section 3167, which was adopted in 1893, so far as material, is as follows:

Sec. 3160. The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

Sec. 3163. Any person claiming such premises may, on motion, be made a defendant.

Sec. 3164. It shall be sufficient for the plaintiff to declare in his petition that on some day, in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the petition, afterwards entered into such premises, and unlawfully withheld from the plaintiff the possession thereof, to his damage, for any sum he may name.

Sec. 3165. The defendant may plead, Not guilty, and under such plea give in evidence any testimony showing that the plaintiff is not entitled to such possession, or that the title is in some other person.

Sec. 3167. The action shall be prosecuted in the real names of the parties, and may be brought against the tenant in possession, or against the person under whom such tenant holds or claims possession.

Sec. 3172. If the plaintiff prevail, the judgment shall be for the recovery of the possession, and for the damages and costs.

Compiled Laws of 1897, pp. 801-2.

It will be seen that the legislature contemplated nothing more than an action at law.

In 1897 the legislature adopted a "Code," a paragraph of one section of which is as follows:

The defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

Sub-section 41 of Section 2685, Compiled Laws of 1897.

Another section was as follows:

The former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this code.

Sub-section 179 of Section 2685, Compiled Laws of 1897.

It was the general opinion of the bar of New Mexico that this excluded ejectment from the effect of the new legislation, but in 1903 there was another act:

Section 1. That sub-section 175 of section 2685 of the Compiled Laws of New Mexico of 1897 be amended so as to read as follows:

"Sub-Sec. 175. This act shall not apply to or in anywise affect the actions in *habeas corpus*, *mandamus*, prohibition, *Quo warranto*, replevin, attachment, ejectment, eminent domain, suits for partitioning real estate, actions to determine and quiet the title of real property, proceedings for the sale of real estate of infants, except as to the formation of the action and all process in the above-mentioned actions, suits and proceedings shall be issued, served and made returnable in the manner and time in accordance with the provisions of section 2685 of the Compiled Laws of New Mexico of 1897 unless such process is otherwise directed

to be issued, served and made returnable by the laws relating to said above-mentioned actions, suits and proceedings."

Laws of 1903, ch. 5.

The legislature in 1905 returned to the subject and made another effort:

Sec. 6. Section 1 of the act of the legislative assembly approved February 19, 1903, being Chapter 5 of the acts of the 35th legislative assembly, is hereby amended so as to read as follows:

Sub-Section 175 of Section 2685 of the Compiled Laws of New Mexico for 1897 be and the same is hereby amended so as to read as follows: All statutes in force at the date of the passage of this act, (section 2685) or enacted since then, or hereafter enacted, relating to habeas corpus, mandamus, prohibition, quo warranto, replevin, attachment, ejectment, eminent domain, suit for partition of real estate, actions to determine and quiet title to real property, proceedings for the sale of real estate of infants, shall not be held to be repealed by the enacting of said section 2685 of the Compiled Laws of 1897, but said section 2685, and all other statutes relating to said subject shall be constructed together as if all of said laws were enacted at the same time, and shall receive such construction from the court as to harmonize the same as parts of one act, and no repeal shall be held to have been made by implication or conflict, except so far as may be necessary to harmonize the said laws and give effect to them as one uniform system.

Section 6, Chapter 114, Laws of 1905.

Conceding then, for the purpose of this argument, that equitable defenses may be applicable to ejectment in New Mexico, we still insist that the essential nature of the action is not changed and that no new rights are

given to a defendant. He is merely given the opportunity to set up by way of defense that which formerly would have been sufficient as a foundation for a suit in equity, either to enjoin the prosecution against him of an action at law, or to obtain independent relief. Laches cannot be such a foundation.

That our position as to the effect of abolition of forms of action and the admission of equitable defenses in actions at law, is correct, will be apparent from a cursory examination of what is, perhaps, the best authority on the subject.

Pomeroy's Eq. Jur. sections 84 to 87. 354. 1369.

But plaintiff has been guilty of no laches of which defendant can complain. This court has indicated that there was such laches that the United States, acting through the court of private land claims, created by an act of Congress which required its proceedings to be in accordance with the practice of the courts of equity of the United States, was not bound to confirm, but it does not follow that defendant can take advantage of that laches.

Plaintiff is asserting a legal title, as to which the legislature has provided a distinct ten-year period of limitation. Plaintiff, or his grantor, could be guilty of no laches or neglect as to the cause of action against defendant until that cause of action arose, and it arose only when defendant's exclusive and continuous possession began, and the only approach to such possession indicated by the evidence, as we have shown under the Sixth point of this brief, is in the

statement of McNulty that he kept everybody off, from some time in 1894.

As to equitable estoppel, the argument is equally strong, and is well supported by authority. The judge of the district court distinctly declared that nothing had been shown which would act as an equitable estoppel, and there was no more in the pleading than in the evidence.

A fair test of the admissibility of this defense in this action can be had by an answer to the question of whether, as a plaintiff, the defendant could maintain ejectment upon a title resting upon such a foundation, or could enjoin the prosecution of the action against him. This is not even supposable under such a statute as ours.

Foster v. Mora, 98 U. S., 428.

Smith v. McCann, 24 How., 406-7.

Claggett v. Kilbourne, 1 Black, 348 to 350.

Fenn v. Holme, 21 How., 488.

Hooper v. Scheimer, 23 How., 249.

It is undoubtedly true that there are cases where the defense of an equitable estoppel may be interposed in actions of ejectment, even without the aid of a statute.

Dickerson v. Colgrove, 100 U. S., 578, 580.

Kirk v. Hamilton, 102 U. S., 76.

An examination of the two cases just cited, will show what are the essential elements of such a defense and how different they are from anything in the present case. The important thing which is lacking in the present case, is the existence of an obligation or duty of the party sought to be estopped to give infor-

mation to the other party, and generally even some degree of turpitude in his conduct is essential.

Bigelow on Estoppel, 5th Ed., 596.

Ditch Co. v. Irrigation Co., 27 Colo., 274.

Viele v. Judson, 82 N. Y., 32, 40.

Horn v. Cole, 51 N. H., 287.

Chapman v. Chapman, 59 Pa. St., 214.

Franklin v. Meyer, 36 Ark., 114.

Bramble v. Kingsbury, 39 Ark., 134.

Rector v. Board, 50 Ark., 128.

Bartlett v. Kander, 97 Mo., 361.

Menshawe v. Bissell, 18 Wall., 271.

A brief quotation from a recent case seems peculiarly applicable:

Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation.

Wiser v. Lawler, 189 U. S., 270.

EIGHTH.

Plaintiff was deprived of the benefit of facts set up in reply to the plea of the statute of limitations.

The facts pleaded in the replications, to which reference is thus made, will be found on pages 13 to 18 of the printed record, in paragraphs numbered from 2 to 8, both inclusive. Upon demurrer by defendant, these paragraphs were held bad, and on this argument

they are to be taken as true. Upon examination, it will be seen that they set up various breaks in the running of the statute, if our view of the law is correct. It is shown that defendant is a foreign corporation; that it did not, by filing the required papers in the office of the secretary of the Territory and in the office of the recorder of any county, comply with the statute as to foreign corporations, until the 28th of December, 1899, and that prior to said day there was no officer or agent of defendant upon whom service of process could be made. It is also shown that the property referred to in the plea of the statute of limitations is the same property which, in March, 1892, was conveyed to another corporation of the same name as defendant, which was also a foreign corporation, and did not comply with our statutes governing foreign corporations, until February, 1897. It is also shown that in June, 1897, the property was conveyed at a judicial sale to two persons who were non-residents and absent, so that service of process could not be made upon them, or either of them. It is also set up that plaintiff, in September, 1899, began an action in the court of private land claims, which he prosecuted diligently and without negligence, but failed therein from causes other than negligence in its prosecution, and that the present suit was begun within six months thereafter.

It will be seen that the general idea upon which these replications are based, is that the running of the statute is suspended during so much of the time, as it is not possible to get service of process upon the alleged holder of the property. So that, even if we ad-

mit that Chauncey G. Storey may have been in the possession of the property in 1892, yet, when he transferred such title as he had to a foreign corporation upon which no service of process could be made for nearly five years thereafter, the statute cannot be considered as running during those five years; and when four months later, the special master sold the property to non-residents upon whom no service of process could be made, the running of the statute was again suspended, and cannot be considered as again in operation until December 28, 1899, when the present defendant, the grantee of those non-residents, complied with the law regulating foreign corporations.

The first thought which arises in the mind upon the statement of these propositions, is naturally as to the frequently announced rule, that when a statute of limitation has begun to run, nothing subsequently occurring will stop it. While this is true as a general principle, yet there are exceptions which, as this court has said, the courts in this country have engrafted upon such statutes.

Braun v. Sauerwein, 10 Wall., 221-2-3.

In the case just cited, the suspension of the statute was brought about by the disability of the plaintiff to sue, in consequence of a prohibition in an act of congress; but there is no difference in principle between this and his inability effectively to sue because he can not get service on the defendant. This is clearly recognized and distinctly held in another case in this court. In that case the defendant, a corporation, pleaded a five years' statute of limitation. The statute of the state provided that when the defendant was

a corporation having a managing agent in the state, service of summons might be made upon such agent, and in instructing the jury, the judge of the circuit court spoke as follows:

If you find that the defendant had a managing agent within the state at the time of the loss, then the statute began to run from that time, and if it had such agent in the state for the next five years after the loss, then this action is barred, but otherwise it is not. In other words, to bar this action the plaintiff must have been able, for five years before suit brought, to have sued the defendant in this state, and compelled it to answer the suit by a service upon a managing agent therein. The time during which the plaintiff is thus disabled from suing by reason of defendant having no managing agent in this state, is not to be counted as part of the five years' limitations.

Express Co. v. Ware, 20 Wall, 543.

This court in its opinion very briefly said that they saw no error in the charge. This case is very nearly like the present one.

In a California case, it appears that a statute of that state distinctly provided that a failure on the part of a foreign corporation to comply with statutory requirements similar to ours, should preclude the corporation from the benefit of statutes of limitation. The court held that such compliance was a necessary fact to be proved by the corporation, in order that it should avail itself of the benefit of the statute of limitation. The court then goes on to hold that the general rule is that foreign corporations come within the provisions of the statutes of limitation which make a saving as against absent debtors, such corporations being, in contemplation of law, absent from all other states than the one

of their creation, and that therefore the statute was not to be regarded as a limitation upon the right to plead the statute, but as conferring the right subject to the condition prescribed. In other words, unless the local statute confers the right to do so, foreign corporations have no right to plead the statute of limitations.

Pierce v. Southern Pacific, 40 L. R. A., 352.

While we have no statute in New Mexico in terms providing that foreign corporations may plead the statute of limitations, yet their right to do so may fairly be inferred from the language used in section 445 of the Compiled Laws of 1897, hereinafter quoted, which section contains the requirements about filing a charter or articles of incorporation in the office of the secretary of the Territory and in the office of the recorder of deeds, and the making and filing in the same offices of a certificate designating the principal place of business and an agent upon whom process may be served. After setting out these requirements, this section says that "Such corporations shall have the same powers," "as corporations of a like character organized under the general laws of the Territory." This may be considered sufficient to permit the setting up of the statute of limitations, but only upon condition of a compliance with the requirements aforesaid of the statute.

In New York it is held absolutely that a foreign corporation, even if it has property and an agent within the state, has no right to plead the statute of limitations.

Olcott v. Tioga R. Co., 20 N. Y., 221 *et seq.*

Rathbun v. N. C. R. Co., 50 N. Y., 656.

Boardman v. Lake Shore R. Co., 84 N. Y., 157.

The decisions are based upon the peculiar wording of the New York statute, which was afterwards copied by Nevada, where the same rule is followed.

Robinson v. Imperial Co., 5 Nev., 44, 76-7.

Barstow v. Union Con. Co., 10 Nev., 386.

State v. C. P. R. Co., 10 Nev. 47

Reference is made to these cases particularly because in Nevada it was held that the same rule must be applied in cases relating to the possession of real estate, notwithstanding the fact that there might be some person in possession of the property for the foreign corporation.

That a foreign corporation is to be regarded as a non-resident within the meaning of a statute which declared that non-residents might be sued in any county in the state, is perfectly plain by reference to another case in this court where it appeared that the foreign corporation had complied with the statute about appointing agents.

R. R. Co. v. Estill, 147 U. S., 607 *et seq.*

6 *Thomp. Corp.*, Sec. 7841.

The statute of New Mexico on this subject is as follows:

Section 445. Every company or corporation incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this territory and now or hereafter doing business in this territory, shall file in the office of the secretary of this territory and in the office of the recorder of deeds of the county in which the principal place of business of such corporation shall be, a copy of its

charter of incorporation, or in case such company is incorporated under any general incorporation law, a copy of its articles of incorporation and of such general incorporation law, and duly certified and authenticated by the proper authority of such foreign state, kingdom or territory. Such company shall, also, before it is authorized or permitted to do business in this territory make and file with the secretary of the territory and in the office of the recorder of deeds of the county in which its principal place of business shall be, a certificate signed by the president and secretary of such company, duly acknowledged, designating the principal place where the business of such company shall be carried on in this territory, and an authorized agent or agents residing at such principal place of business upon whom process may be served, and such corporation shall have the same powers and shall be subject to all the liabilities and duties as corporations of a like character organized under the general laws of this territory.

Sec 445, Compiled Laws of 1897.

As to the replication which pleads the former action in the court of private land claims, plaintiff's failure therein for causes other than negligence in its prosecution, and the beginning of the present suit within six months thereafter, plaintiff relies upon section 2925 of the Compiled Laws of 1897, which provides that, under such circumstances, the second suit shall be deemed a continuation of the first. That section is as follows:

Section 2925. If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first.

To this replication, the defendant specifies four grounds of demurrer, of which the first, second and third do not seem to call for any special consideration. The fourth ground is, in substance, that the replication does not show that suit was instituted by plaintiff against defendant for the recovery of the property, and that such suit was dismissed without judgment upon the merits, and the present suit begun within six months thereafter; and that it does not show that the action in the court of private land claims was for the recovery of the possession of the property or was of the same nature and character or between the same parties as the present suit.

As to the first clause of this objection, we take it that the material part of it is that the replication does not show that the former suit was dismissed without judgment upon the merits. If there were a judgment on the merits, we would admit that there had been an adjudication which concluded the plaintiff, but we have, in the replication, followed the language of the statute, and that certainly is all which can be required of us as a matter of pleading. We will take no further time on this point.

As to the second clause, a little more examination may be necessary. With the replication, and as a part of it, are filed the petition of plaintiff in the court of private land claims and the answer of the defendant. It will be seen by a comparison of these papers with the pleadings in the present case, that the action in the court of private land claims was for the same property sued for in the present case, and that the defendant

set up the same defense of the statute of limitations which is now under consideration.

In the court of private land claims there might have been either one of the following judgments:

First, a confirmation of the claim for the whole grant.

Second, a confirmation of the grant excluding the lands claimed by defendant.

Third, a rejection of the whole claim.

No reasonable man will contend that if either the second or third of these judgments had been rendered the plaintiff could thereafter have asserted in any court a title to the lands held by defendant. His claim to those lands would have been adjudicated, and the adjudication would estop him from any further litigation relative thereto. Especially would this be the case if the second of these judgments had been rendered. And no reasonable man can contend that the decision of a case if decided one way, would be *res judicata* as to a plaintiff, and if decided the other, would in no way be binding on the defendant. If plaintiff would be concluded, as between himself and the present defendant, by an adverse decision in the land court, then, it must follow that defendant would have been equally concluded by a decision in that court favorable to plaintiff.

The act creating the court of private land claims in section 6, requires a claimant to set out the names of any persons in possession of or claiming the land, or any part thereof, otherwise than by permission of the petitioner, and, as is well known, the land court held this to be a mandatory provision requiring claimants

to make such adverse claimants or possessors parties defendant. This court in considering this requirement, speaks as follows:

Apparently, however, the only object of requiring notice to be given the adverse possessors or claimants is to compel them to show the location and boundaries of their claims and that they are not mere squatters or trespassers, but hold the land under a grant from the United States, in which case, under section 14, such title from the United States to such other person "shall remain valid notwithstanding such decree." If, however, it appear, as it does in this case, that the petitioners admit that the adverse possessors or claimants do hold under grants from the United States, and there are no disputed boundaries, there would appear to be no substantial reason for making them parties, inasmuch as they could not be affected by the decree. The only consequence of an omission to serve on them a copy of the petition is an acknowledgment of their title and of its boundaries.

U. S. v. Martinez, 184 U. S., 446.

Sena made the defendant a party to the action in the court of private land claims because he did not admit that defendant had any title from the United States or any right whatever to the land, and a decision by the land court of the issues raised by defendant's answer would be decisive and controlling in the present litigation, if there ever had been such a decision. As a matter of fact, there never was any such decision, as will be apparent by reference to the case of *Sena v. The United States*, 189 U. S., 242.

To state the proposition in slightly different language, there can be no doubt that if the land court had decided that the title asserted by plaintiff in that

court was perfect except as to so much of the land as was claimed by defendant, or if that court had held that the title was of no validity whatever, the present defendant being a party to that action, defendant would be able successfully to plead in the present case the former adjudication against any claim which plaintiff would assert. This being so, the replication must be held good, and section 2925 of the Compiled Laws as covering this case.

In the supreme court of New Mexico counsel for defendant argued that section 2925 could have no application to actions for the recovery of real estate because it was originally section 12 of the statute of 1880, which created limitations as to actions other than those for the recovery of real estate, and because section 16 of the same act, which appears in the Compiled Laws as section 2929, contains provisions preserving other limitations already existing by statute. That section reads as follows:

None of the provisions of this act shall apply to any action or suit which, by any particular statute of this territory, is limited to be commenced within a different time, nor shall this act be construed to repeal any existing statute of the territory which provides a limitation of any action; but in such cases the limitation shall be as provided by existing statutes.

Section 2929, Compiled Laws of 1897.

The argument goes further that there was at that time already in existence a ten year statute of limitations as to the recovery of real estate which had been originally enacted in 1858, and therefore the provisions contained in section 2925 could not apply to this already existing limitation.

There are two answers to this argument. The first is that the language of section 2925 is unlimited and by its terms is applicable to any sort of an action, while by the exercise of ordinary common sense in the consideration of section 2929, it is apparent that its intention merely was that the new act of 1880 should not affect limitations already provided by statute as to actions not covered by the new law. The other is that by the action of the legislature in 1884, the provisions of the act of 1880, and of the earlier statute concerning the limitation of actions for the recovery of real property, have been, in effect, re-enacted as one statute, so that the provisions of sections 2925 of the compilation of 1897, extend to actions of ejectment as well as to the other actions enumerated in the chapter.

On April 3, 1884, the legislature provided for an authoritative, legalized compilation of the laws of the territory, of which act section 4 reads as follows:

When said laws shall have been printed, and are ready for distribution, the governor shall issue his proclamation announcing such fact, and thirty days after the date of such proclamation said compilation shall go into effect, and thereafter the laws so compiled shall be received by all the courts and officers of this territory, and shall in all respects be as valid and binding as original enrolled acts approved and filed in the office of the secretary of the Territory as now provided by law.

By reference to Chapter 2 of Title 33 of the compilation thus provided for, beginning at section 1860 and ending with section 1881, it will be found that all of the act of 1880 is included, together with the two sections as to limitation of actions for the recovery of real

estate. There can be no doubt of the legislative intent that the general provisions in the act of 1880, like those contained in section 2925 of the Compiled Laws of 1897, should apply as well to actions concerning real estate, as to any other actions. Subsequent legislatures up to 1897, by repeated acts of legislation, treated the Compiled Laws of 1884 as the laws of the Territory, thus recognizing the official and binding character of that compilation. It may be suggested that there was no necessity, if our view is correct, of including the section which declared that "None of the provisions of this act shall apply to any action or suit which by any particular statute of this territory is limited to be commenced within a different time," but there was such necessity when one takes into consideration the fact that there were other periods of limitation not included in this chapter of the Compiled Laws, such as the one year limitation as to actions of replevin, the limitation as to the time within which actions may be revived after the death of a party, the limitation of two years within which actions must be brought against the estates of deceased persons, the limitation of one year for the beginning of actions to recover money lost at gaming, the limitation as to actions for wrongfully causing death of a person, and perhaps, others which were at that time in force.

NINTH.

Depositions taken for use in the court of private land claims were improperly admitted in evidence, if the court were correct in sustaining demurrer to replication.

In the discussion of the eighth point of this brief.

it has been shown that the court sustained a demurrer to one of plaintiff's replications, which set up the former suit in the court of private land claims and its dismissal for causes other than negligence in its prosecution, and the subsequent beginning of the present suit within less than six months. This demurrer could have been sustained only upon the ground that the former action was not between the same parties and for the same purpose.

The depositions which were admitted in evidence had been taken and used in the former suit in the court of private land claims. They will be found in the printed record, on pages ¹⁴⁴~~175~~ to ¹⁵⁴~~188~~. Objections to their admission will be found on page ¹⁴³~~174~~. The only possible ground upon which the depositions could be admitted, was that the former suit was one between the same parties and for the same purpose.

If the court was correct in its ruling on the demurrer, it could not have been correct in admitting the depositions.

A further, and more serious, objection to the admission of the depositions was made that it was not shown that they were properly admissible even in the land court, and it was admitted by counsel that the witnesses were in attendance on the court at the time that their depositions were read. These depositions were taken *de bene esse*, and were not admissible if the witnesses themselves could be produced and examined orally.

The rule of the court of private land claims on this subject was as follows:

In all cases witnesses for either party shall be

examined in open court upon the trial of the cause, unless they are sick, infirm, or otherwise unable to attend, and in that event either party desiring the testimony of such witness or witnesses shall make application to the court or any judge thereof to take the deposition of such witness or witnesses, and if it appears to the satisfaction of the court or judge that such witness or witnesses ought not or cannot be compelled to appear in court and testify, the court or judge shall make an order allowing the deposition of such witness or witnesses to be taken.

TENTH.

The deed to plaintiff is valid.

This point is anticipatory, and is made because, in the supreme court of New Mexico, counsel for defendant asked for the application,—to us a most surprising position,—of the doctrine of the invalidity of a deed made while the grantor is out of possession and the land is in the possession of another,—a doctrine which, in view of decisions of this court, must be considered as obsolete in that jurisdiction. There are states where it is retained, but that fact cannot affect the courts of New Mexico.

It is so clearly discountenanced by this court, that there can be no doubt on the subject. The following quotation plainly shows this:

In this country, where lands are an article of commerce, passing from one to another with such rapidity, the ancient doctrine of maintenance, which makes void a conveyance for lands held adversely, is in many states entirely rejected. In some it has been treated as obsolete by the courts; in others it has been abolished by statute;

while with some it appears to have found more favor.

The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The repeated statutes which were passed in the reigns of Edw. I and Edw. III against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power.

Roberts v. Cooper, 20 How., 483.

In another, and much more recent case, we find the following:

We are then brought to the consideration of the principal question in the case, whether the deeds to the plaintiffs were void for champerty.

In many parts of the United States, and probably in Maryland and consequently in the District of Columbia, the ancient English statutes of champerty and maintenance have either never been adopted, or have become obsolete, so far as they prohibited all conveyances of lands held adversely. 4 *Kent Com.*, 447; *Roberts v. Cooper*, 20 How., 467; *Schaferman v. O'Brien*, 28 *Maryland*, 565; *Matthews v. Herner*, 2 *App. D. C.*, 349.

Peck v. Heurich, 167 *U. S.*, 629-30.

The last quotation naturally leads to the examination of the Maryland case cited, to see what the court means by the phrase "and probably in Maryland," and we find the following:

It has also been insisted that the complainant having purchased the judgment against Leiman, subsequent to the deed, has no standing in court

—that such a purchase savors of champerty—is in violation of the statute of Henry VIII, ch. 9, recognized in Kilty's Report, as in force in this state. 'This statute prohibits under penalties, the buying or selling of any pretended right to land, unless the vendor is in actual possession of the same, or of the reversion or remainder. "The ancient policy which prohibited the sale of pretended titles as an act of maintenance, was founded upon a state of society which does not exist in this country." 4 Kent, 256.

The statute of Henry VIII, ch. 9, is not rigidly enforced in this country. *Sedgwick vs. Stanton*, 14 N. Y. Rep., 289. "It will have been perceived that the subject of the assignment of rights of action, as tending to the common law offenses of champerty and maintenance, is here left in a state of considerable uncertainty." The subject was examined in a late case, (*Danforth vs. Streeter*, 28 Vermont, 490,) and the following conclusion reached: "That the bona fide purchaser of a bond or other chose in action, which is represented to be due, and which the purchaser believes to be due, may sue upon the same and not incur censure from the law; and that all contracts founded upon any such consideration are valid. The same is true of any aid one may render another in a suit, by way of money or advice or other lawful assistance, if done under a bona fide belief in the justice of the case. It was upon these grounds that we venture to suggest that the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete." Story's Eq. Jur., sec. 1057. "Maintenance now means, where a man, improperly and for the purpose of stirring up litigation and strife, encourages others, either to bring actions or to make defences, which they have no right to make." *Fin- don vs. Parker*, 11 Mccs. & Welsby, 679, 682, referred to in 4 Kent, 531.

We are not aware of any case in the judicial history of this state, where the provisions of the statute of Henry VIII, have been enforced—without meaning to assert that there might not be such exceptional conduct savoring of champerty and maintenance, as to be punishable, yet there can be no doubt that this statute is, in a great measure, now obsolete.

Schaferman v. O'Brien, 28 Md., 573-4.

The same rule is followed in a very recent case.

Chesapeake B. R. Co. v. W. P. & C. R. Co.,
199 U. S., 252.

In conclusion, we call attention to the statute of New Mexico as to the jurisdiction of the supreme court of the territory in cases brought before it for review. This will be found in section 3141 of the Compiled Laws of 1897, and is as follows:

"The supreme court in appeals or writs of error shall examine the record, and on the facts thereon contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."

This section was repealed by section 60 of chapter 57 of the laws of 1907, but was reenacted in section 38 of the same chapter without any change except to correct the obvious error of the word "thereon," instead of "therein," and with the addition of another clause, not here material, as to the reviewing of cases tried without a jury.

It will be seen that the supreme court is given discretion to enter a final judgment without being limited to awarding a new trial, reversing or affirming the judgment of the court below. If we are correct in the

positions taken in this brief, it was clearly the duty of that court to enter a judgment in favor of plaintiff.

It is therefore respectfully submitted that, not only should the judgment of the supreme court of New Mexico be vacated and set aside, but that, in addition, the cause should be remanded to that court, with directions to enter a final judgment in favor of the plaintiff in error, as ought to have been done when the case was heard and decided in that court.

HARRY S. CLANCY,

FRANK W. CLANCY,

Counsel for Plaintiff in Error.

FILED.

MAR 9 1911

JAMES H. MCKENNEY,

CLERK.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA,

Plaintiff in Error,

vs.

AMERICAN TURQUOISE
COMPANY,

Defendant in Error.

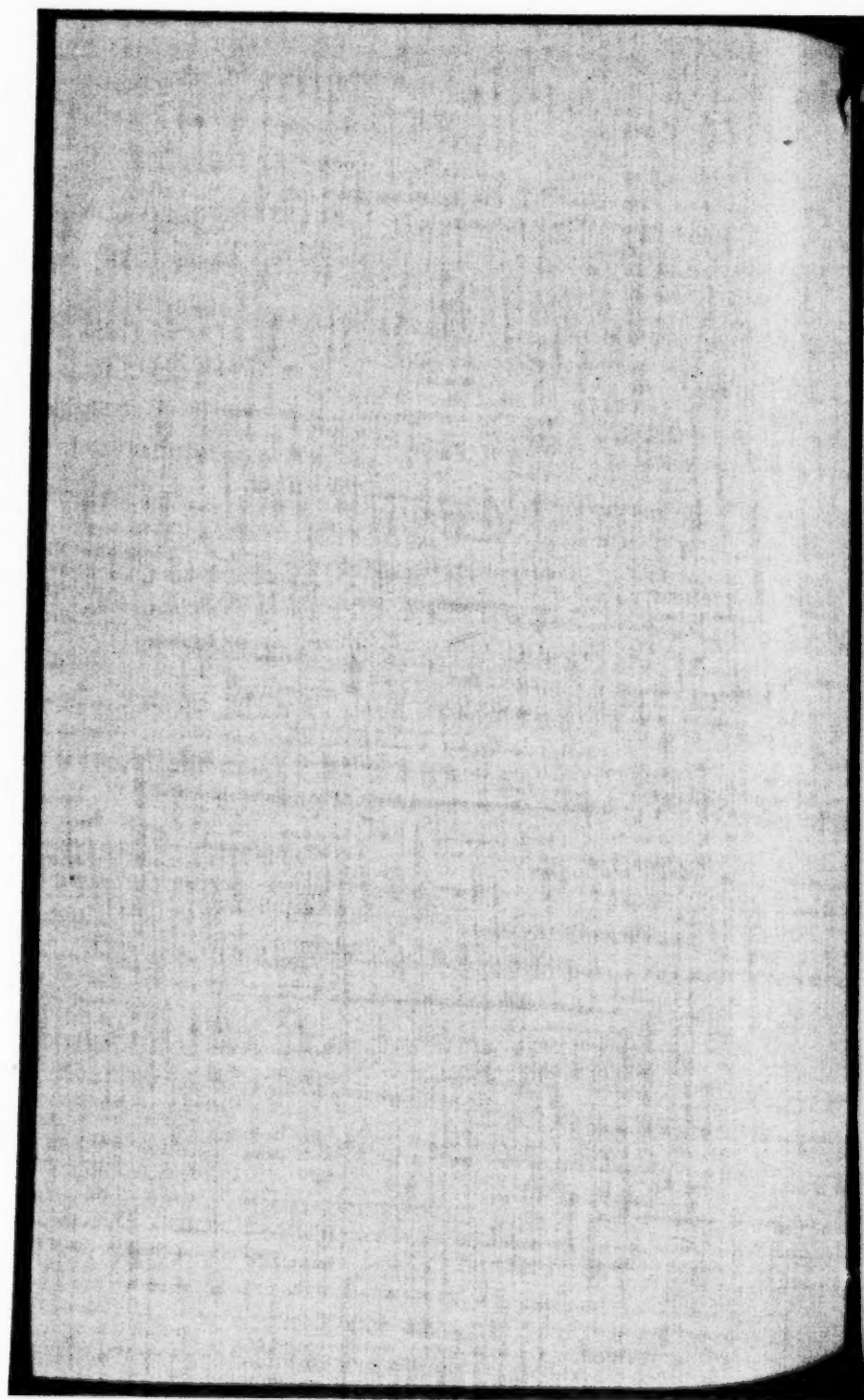
BRIEF FOR DEFENDANT IN ERROR.

MATT. G. REYNOLDS,

THOS. B. HARLAN,

STEPHEN B. DAVIS, JR.,

Counsel for Defendant in Error.



IN THE
SUPREME COURT OF THE UNITED STATES

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No. 73.

MARIANO F. SENA,
Plaintiff in Error,
vs.

AMERICAN TURQUOISE
COMPANY, *Defendant in Error.*

STATEMENT.

This is an action of ejectment brought by plaintiff in error to recover the possession of certain lands in Santa Fe County, New Mexico. Plaintiff claims title under a Spanish grant alleged to have been made in the year 1728. The land in question contains valuable deposits of turquoise, and defendant is in possession claiming under several mining locations made in the years 1885 to 1892 by its predecessors in interest, who believed the land to be public domain of the United

States and entered upon it under the general mining laws.

The grant relied upon by plaintiff in error is known as the Jose de Leyba Grant, and was before this court, on appeal from the Court of Private Land Claims, in the case of *Sena v. United States*, 189 U. S. 242.

The general issue plead by defendant in error raises the question of the validity of the Jose de Leyba Grant and the sufficiency of its boundary calls, and as additional defenses defendant in error has plead and relies upon adverse possession for the statutory period and the laches of plaintiff in error.

The Supreme Court of New Mexico, in affirming the decision of the District Court of San Miguel County in favor of defendant in error (R. p. 179), did not pass upon either of these affirmative defenses, but based its decision solely on the finding that the Jose de Leyba Grant was an imperfect grant, and for that reason not sufficient title to allow plaintiff in error to recover.

BRIEF.

I.

The Findings of Fact by the District Court of San Miguel County Will Not Be Reviewed in This Court.

After the testimony had all been introduced in the District Court and the case concluded, plaintiff and defendant each moved the trial court for an instructed verdict (R., p. 171). As both parties to the action at the close of the case moved the trial court for an instructed verdict, and neither submitted nor requested any special instructions to the jury, the findings of fact by the trial court, under such circumstances, will not be reviewed by this court. Therefore, this court, under the rule, "is limited in reviewing its action, to the consideration of the correctness of its finding on the law and will affirm, if there be any evidence in support thereof."

Buetell v. Magone, 157 U. S. 154.

Empire State Cattle Co. v. A., T. & S. F. Ry. Co., 210 U. S. 1.

On the trial of this case there was practically no dispute as to facts. On the issues of the character of the paper title of plaintiff, and the adverse possession of defendant, the record shows no conflict. There was some conflict in the proofs as to the definiteness of the boundary calls of the Jose de Leyba Grant, and it is chiefly upon this issue that the rule above expressed becomes of importance. Attention will be called to it in the discussion of that subject.

II.

The Jose de Leyba Grant, Not Being a Perfect Grant and Having Received no Confirmation by the United States, Does Not Constitute Title on Which a Judgment for Plaintiff Could Have Been Based.

The title of plaintiff in error to the land in controversy rests entirely upon the title to the Jose de Leyba Grant. That grant can avail him nothing unless its title was perfect under the laws of Spain and Mexico. If it was an imperfect grant, then it is insufficient as a source of title, for it has not been confirmed by the Congress of the United States and was refused confirmation by the Court of Private Land Claims (R., p. 141), and the claim of its validity is therefore barred by Section 12 of the Act of March 3, 1891, creating the Court of Private Land Claims, providing that such claims if not prosecuted before that court within two years from the taking effect of that act should "be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred."

There is no controversy upon this feature of the case, the argument of plaintiff in error (brief, pp. 18-25) being entirely to the effect that the grant was in fact perfect.

Upon this branch of the case the question therefore is as to the character of the Jose de Leyba Grant, whether it was perfect or imperfect. The standard by which this question is to be determined is correctly stated in the brief of plaintiff in error (p. 19), as follows:

"The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this court, and resulted in the acknowledgment of the distinction,

and resting it on the following basis, that is to say: If the grant were to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the government or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance.

Hancock v. McKinney, 7 Tex. 384."

In *Territory v. Delinquent Taxpayers*, 12 N. M. 169, a perfect grant is defined as one "where the granting power has, on the one hand, done all that the law required to make a complete title, and the grantee has also done all that the law requires of him to receive and enjoy it in fee."

The petition and grant appear on pages 31 and 32 of the Transcript. The grant was made in the year 1728 by Juan Domingo de Bustamante, then Governor and Captain General of New Mexico. He ordered the chief alcalde to give juridical possession, which was done. No further steps were taken and the grant was never approved, confirmed or acted upon by anyone other than the Governor.

In the year 1728, when this grant was made, the King of Spain exercised his power in Mexico through a Viceroy, and Royal Audiencias of which the Viceroy was the chief officer. The province of New Mexico was then under the control of the audiencia at the City of Mexico (Hall, Mexican Law, Paragraph 12). The whole of the Mexican territory was divided into various kingdoms and provinces, each of which had its governor exercising executive functions within its limits, subject to the control of the Viceroy and proper audiencia (Hall, par. 13). The Viceroy was

looked upon as the "Alter ego" of the King; the governors were officers of limited jurisdiction and wholly subordinate to him. (Reynolds, Spanish and Mexican Land Laws, p. 26.)

In the early years of Spanish rule, grants of land in Mexico were made by the King himself. In 1591 this power was by royal cedula conferred on the Viceroy. (Hall, Sec. 21.) Subsequently the same power was exercised by certain agents of the audiencias apparently subject to the approval of the Viceroys. (Hall, Sec. 25.)

In 1617, by a royal cedula the King provided that all grants of land should be confirmed by him before definite title passed. The effect of this was to take from the Viceroy the absolute power of disposition or approval, and to vest that power once more in the King. (Hall, Sec. 26, Reynolds, p. 26.)

So far as counsel for defendant in error have been able to discover, the above are the only important laws relative to the disposition of Crown lands in force in New Spain prior to 1735. No others worthy of mention are cited by the various authorities on the subject. It will be noticed that none of these specifically give authority to governors of provinces to dispose of the royal domain, the presumption being that in so doing they acted as designated agents of the audiencias, and the Court will notice the care with which the King provided for a ratification and approval of the acts of subordinate officers, either by himself or his Viceroy. It is stated by both Hall and Reynolds, though no authority is cited for the statement, that at some time subsequent to 1617 the necessity for confirmation by the King personally was done away with. If this be so, it is fair to presume that the power of approval was once more vested in the Viceroy.

In 1735, seven years after the date of the Leyba Grant, the King by royal cedula again required that grants of land should be submitted to him for confirmation before title should pass to the grantees (Hall, par. 27; Reynolds, p. 26), but this cedula was in turn superseded by that of October 15, 1754, to which we desire especially to call the Court's attention. This cedula is set out in full in White's *Recopilacion*, Vol. 2, p. 62, and Reynold's *Spanish and Mexican Land Laws*, p. 50. The King, after reciting the inconvenience and unnecessary expense caused by his cedula of 1735, and stating that many of his subjects were occupying portions of his public domain without good title, orders that all persons in possession of such lands should submit their titles to his officers for their inspection and decision regarding their validity. This provision is contained in Section 3 of the cedula, which is translated by White as follows:

“The present regulations, and the appointment which shall be issued in the form prescribed in the first section, being received by the principal sub-delegate, they shall furnish, on their part, general orders to the justices of the capitals and chief places of their respective districts, commanding them to be published therein, in the manner usual with other general orders issued by viceroys, presidents and audiencias, relating to my service, so that every and all persons who shall have possessed royal lands, whether settled, cultivated, tilled, or not, from the year 1700 till the day of the publication of said order, may prove, before the sub-delegate, by themselves, their correspondents, or attorneys, the titles and patents in virtue of which they hold their land. For this exhibition an adequate time shall be fixed, proportioned to the distances; and notice shall be given, that they shall be deprived of, and ejected from, such lands, and grants of them made to other persons,

of they fail to exhibit their warrants within the limited time, without just and proper cause.”

Section 5 of that cedula reads as follows, copying from White:

“The possessors of lands sold, or compromised for, by the respective sub-delegates, from the said year 1700 to the present time, shall not be molested, disturbed or informed against, now, nor at any time, if it shall appear that they have been confirmed by my royal person, or by the viceroys and presidents of the respective districts, while in office; but those who shall have held their lands without this necessary requisite, shall apply for their confirmation to the audiencias of their district, and to the other officers, on whom this power is conferred by the present regulation. These authorities having examined the proceedings of the sub-delegates, in ascertaining the quantity and the value of the lands in question, and the patent that may have been issued for them, shall determine whether sale or composition was made without fraud or collusion, and at reasonable prices. This shall be done with the judgment and advice of the fiscals; after considering every circumstance and the price of the sale or composition, and the respective dues of medianata—(first fruits of the half year)—appearing to have been paid into the royal treasury, and the king’s money being again paid in the amount that may seem proper, the confirmation of the patents of the possessors of these lands shall be given in my royal name, by which their property and claim in the said lands shall be rendered legal, as well as in the waters and uncultivated parts, and they and their successors, general and particular, shall not be molested therein.”

It is thus apparent that the King of Spain did not recognize the titles of grant holders whose claims had not been approved by himself or his Viceroy or Au-

diencia. He speaks of such persons as holding their titles "without this necessary requisite." He did not consider their titles perfect, and required them to be made perfect by obtaining such approval. The Jose de Leyba Grant admittedly is within the class affected by this cedula. In the eyes of the King it was imperfect when made. The claimants did not take the necessary steps to perfect it in accordance with this cedula. Under Spanish law, as set out in Section 3 above, they were liable to be "deprived of and ejected from such lands, and grants of them made to other persons" at any time. Certainly "something remained to be done" both by Jose de Leyba and by the officers of the Spanish crown before final title passed to him.

In the case of *Menard's Heirs v. Massey*, 8 How 293, the Supreme Court of the United States, speaking of a grant made by the Lieutenant Governor of a Spanish province which had not been confirmed by the Intendant, to whom the confirmatory power was entrusted by an Ordinance of the King of Spain, in 1786, says:

"The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant-governors, and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or some one for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed: the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat, together with the process-verbal. But this did not make the party owner; without the further act of the king's deputy—the Intendant-General—the title still continued in the crown."

The foregoing is the precise ground upon which the Court of Private Land Claims rejected the Leyba Grant. In speaking of that Grant, the Court says:

“Upon consideration of the state of facts presented, the Court has reached a conclusion which may be briefly stated. The first question arising is, what is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant, and therefore could be brought into this Court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700 unless already confirmed by royal order of the King, or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case, either by the documents presented or otherwise that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any grounds that will justify a presumption of such compliance with the requirement for confirmation. It therefore follows that this grant must be held to be not a perfect but an imperfect grant.”

The above is the opinion of the court specially created to deal with Spanish and Mexican land grants, and particularly familiar with the laws of Spain and Mexico governing their validity.

The Supreme Court of New Mexico, which based its decision upon the imperfect character of the grant used the following language:

“In 1754 the government of Spain was that of an absolute monarchy, and it is not for us to question the right of the King to compel holders of titles theretofore given to apply for confirmation.

It was therefore necessary for the then claimant of the Jose de Leyba Grant to obtain such confirmation. Without it his grant became void and he could at any time be ejected by the sovereign, or any other person to whom the same land was equally granted. There is no documentary proof before us of any such application, or of any confirmatory action by the Spanish Governor or other officer. It is not unlikely that the certificate of confirmation would be endorsed on, or attached to the original grant papers, but no such certificate appears though the original is in evidence. It being incumbent upon plaintiff to show that his grant was perfect, its confirmation became a necessary element in his proof. No such evidence having been introduced, the grant must necessarily be held imperfect, unless such confirmation is to be presumed from the surrounding facts and circumstances."

We cannot agree with the statement on page 20 of the brief of defendant in error that the opinion of the Court of Private Land Claims on this subject was "practically repudiated by this court" on appeal in *Sena v. U. S.*, 189 U. S. 242. It is true that the particular point was not discussed in the opinion proper, but such discussion was then unnecessary inasmuch as the court rejected the grant on other grounds.

Defendant in error does not dispute the fact that his paper title is defective owing to the lack of confirmation under the cedula of 1754. Indeed, he practically admits that such confirmation was essential (brief, pp. 19, 20). His argument is that although there is no record proof of confirmation the evidence as to possession of the grant is such that confirmation will be presumed.

It is true that actual possession of land continued for a sufficient length of time, may, under proper cir-

cumstances, give rise to a presumption of title and of the existence of the links necessary to constitute the chain of title. That being the law, the question is as to whether or not the facts in the present case are sufficient to raise such a presumption.

This presumption arises only from actual possession. It does not arise from a claim of title unaccompanied by actual possession. And while possession may be presumed to be in him who holds the legal title, there is no such presumption as to one claiming a title not in fact valid. To say that a claim of title implies possession, and that perfect title is presumed from such possession is to reason in a circle. The question on this branch of the present case, therefore, is as to the proof of actual possession of plaintiff in error. And, before inquiring as to his possession, it is well to keep in mind the fact that for more than ten years prior to the commencement of this action the land has been in the actual adverse possession of defendant in error, a fact which will be further discussed in connection with the defense of the statute of limitations, so that as to such period there is no possibility of any presumption in aid of plaintiff in error.

Excepting the certificate of juridical possession of the grant (R., p. 32), and without discussing the question whether the acts mentioned in this certificate show an actual or only a technical possession, the record in this case discloses very few circumstances from which to draw a conclusion that the claimants of the land in question ever had it in actual possession. The evidence relied upon by plaintiff in error is as follows:

1st. The will of Zimeon de Leyba (R., p. 47).

This will contains a statement that the testator made it "at his ranch" at this place of the "Coyote Springs," and a statement that there was constructed

on the ranch a small house and some other improvements. This house was not his residence, as appears from the third item of the will. While this will shows a claim of ownership, it falls far short of proving any actual possession of the grant, and even if it can be said to prove possession of the small house, it certainly does not prove actual possession of the land involved in this case.

2d. The deed of Salvador Antonio Leyba to Juan Angel Leyba (R., p. 48).

It appears from this deed that both parties to it were residents of the City of Santa Fe. The deed contains no statement of any kind as to the possession of the land conveyed, nor can actual possession be presumed from the mere execution of the instrument.

3d. The statement that Juan Angel Leyba was killed on the grant by the Indians (R., p. 52).

It is difficult to understand how actual possession can be deduced from this fact. Presence does not imply possession. The language of this court in *Sena v. U. S.*, that "it seems to have been uncertain whether he (Juan Angel) was in actual possession of the tract" at least shows that this court was unwilling to draw any such conclusion.

4th. The pledge of Josefa Leyba (R., p. 74).

This instrument, while it may show a claim of ownership, certainly contains nothing on which to base a conclusion of possession.

5th. The testimony of Felipe Pino (R., pp. 166-168), is referred to in the brief of plaintiff in error (p. 25) as showing acts of dominion, ownership and use of the land. It amounted simply to statements by the witness that certain of the Leyba's told him that at one time some cattle belonging to them pastured on the grant. Most of the testimony was excluded by

the trial court as being hearsay. The fact that cattle belonging to the Leybas, but in the custody and control of a third party who had them on shares, pastured on the grant, certainly does not show possession in the Leybas.

The Supreme Court of New Mexico (R., p. 182), in deciding the present case, made the following statement as to the facts of possession:

“In this case the plaintiff was not in possession of any portion of the grant at the time of the commencement of the present proceeding, and no one of his predecessors in interest had been in possession since the American occupation. The various documents bearing date prior to 1840 show a claim of ownership rather than actual use, and the title claimed may or may not have been accompanied by possession.”

And the Court of Private Land Claims, when the Leyba Grant was before it for decision, in passing upon the proof of possession, said:

“The evidence as to settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant and knowledge of its existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting.”

Plaintiff in error now claims that the proof in this respect is stronger than that before the Court of Private Land Claims. We think the record demonstrates that the evidence on this point in the Land Court and upon the trial of this case was substantially the same.

Plaintiff in error cites *U. S. v. Chavez*, 175 U. S. 520, and *U. S. v. Pendell*, 185 U. S. 196, as authority for his argument that a presumption of the confirmation

of the Leyba Grant arises from possession. The facts in those cases were widely different from those in the case at bar, and in each of them there was a conclusive finding of actual possession.

In *U. S. v. Chavez*, 175 U. S. 509, this court stated the facts as to the possession of the grant there in question as follows:

“Private ownership of the property with possession is claimed for over one hundred and thirty years before the cession of the territory to the United States. A continuous possession is shown from some time prior to 1785, inferentially from 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico. Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the territory to the United States no one questioned them.”
(pp. 519, 520.)

“Besides, it is admitted that the Pueblo of Isleta has had open and notorious possession as far back as the memory of the oldest inhabitant can extend, and that it was claimed under the heirs of Clemente Gutierrez, and evidenced by documents which came from the custody and control of the officers who have had them during like memory. Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose.”
(pp. 523, 524.)

In *U. S. v. Pendell*, 185 U. S. 196, the trial court stated the facts of possession as follows:

“Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed

to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by the doctrine established in the case of *United States v. Chavez*, 175 U. S. 509.

And the same court made the following finding of fact:

"3. That the land included in the said out-boundaries continued in the possession of the said grantee, his heirs, legal representatives, and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee." (p. 192.)

And because of the foregoing findings, this court stated:

"In this case we therefore take the fact to be that there was a possession under a grant of some kind, starting before 1790, and continuing, uninterrupted, until the filing of the petition." (p. 198.)

If the statement by the Court, in *United States v. Chavez*, *supra*, to the effect that the government of Spain respected the ownership and possession of the grant for over one hundred years, is of importance, it is to be noted that the opposite is the fact in this case, for the Cerillos Grant, made in 1788 by the Spanish authorities (R., p. 157), includes land within the claimed boundaries of the Leyba Grant.

It will therefore be seen that in each of the foregoing cases there was proof of an actual and ancient possession continuing to the time of trial, and it was upon that state of the facts this court presumed the validity of the grant. In the present case there are no such facts upon which the presumption can be based. Even giving the broadest effect to the claim of plaintiff in error, there is no evidence whatever of any possession or claim of title from the year 1855, the date of the pledge above mentioned, to the date of the commencement of this action, a period of nearly fifty years.

There being no record proof of confirmation of the Leyba Grant under the Cedula of 1754, and no proof of possession sufficient to raise a presumption of validity, the grant must be held imperfect and the title of plaintiff in error to the land in question fails. On this ground alone the judgment of the lower court should be sustained. But if this court takes a contrary view to that above expressed, then its action should still be the same because of the indefiniteness of the boundaries of the grant and the affirmative defenses of defendant in error.

III.

The Question of Boundaries.

The question of the boundaries of the Jose de Leyba Grant is important in two aspects of the present case: In the first place, it is essential to the validity of the grant as a perfect title that the boundaries be definite and susceptible of exact location on the ground. In the second place, this being an ejectment proceeding for the recovery of mining claims of a total area of about fifty acres, plaintiff's claim to which rests

entirely upon his claim to the grant, it is incumbent upon him to prove that this acreage is within the boundaries of a defined grant. So that it is not unjust to say that in this case, where plaintiff seeks to use his grant as a weapon of offense with which to oust defendant from possession the proof of boundaries should be even more definite than in *Sena v. U. S.*, *supra*, which was under the Private Land Claims Act where the only question was as to whether or not the grant was entitled to confirmation through the Court of Private Land Claims.

At least two of the boundary calls "the lands of Juan Garcia de Las Rivas" on the west and "an arroyo called Cuesta del Oregano" on the south, are extremely indefinite. The mines in question are located in Section 21, in Township 15 North of Range 8 East, and the map opposite page 50 of the Record shows that they are therefore not more than a mile east of the western grant boundary as claimed, and not more than about two miles north of the southern boundary as claimed. These two boundaries, therefore, become of great importance in this case.

Plaintiff in error now claims to have shown that the eastern boundary of the lands of Juan Garcia de las Rivas, which forms the western boundary of the Leyba Grant, is the Penasco Blanco de las Golondrinas.

It is fair to assume that the map opposite page 60 of the Record, locates the Leyba Grant as nearly as possible in accordance with the boundary calls. A glance at this map shows that the Leyba Grant as claimed by plaintiff does not even touch the Penasco Blanco on the west. The Penasco is northwest of and outside of the grant lines as there drawn. According to this map the west line instead of being the "land of Juan Garcia de las Rivas" as called for by the grant

papers, is the Cerillos tract and public lands. If it touches at all on the Garcia lands it is only for a very short distance.

The location of the south boundary, "an arroyo called cuesta del oregano," is also doubtful. Many of the witnesses, all of whom profess to be familiar with the country, testify that they never heard of such an arroyo in that vicinity. While others do attempt to locate it, it is apparent that a surveyor could ascertain its position only by taking evidence and determining disputed questions of fact.

A grant to be perfect must have definite boundaries. No other authority upon that point is necessary than the case of *Carpentier v. Montgomery*, 13 Wall 480, quoted from in plaintiff's brief. The Supreme Court of the United States said in that case:

"Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the rancho. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace, or where it did run, is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should be run, in order to separate the rancho from the public domain. But it cannot make that title perfect which was not perfect before."

A reading of the grant papers set out in that case will show that they set out boundaries at least as definite as those of the Leyba grant. The limits are designated by natural objects, and in addition "firm

landmarks'' were fixed on the boundaries (pp. 482, 483).

A reading of the opinion of this Court in the case of *Sena v. U. S.*, 189 U. S. 237, upon the subject of the boundaries of this grant is instructive. There this court practically says the boundaries cannot be ascertained. The proof upon that subject in the present case is substantially the same as that then before this court, except that plaintiff has now shown the east boundary of the Garcia de las Rivas land, and consequently the west boundary of the Leyba land, to be the Penasco Blanco as above referred to. Certainly in this case, where the boundaries must be proved not only for the purpose of showing that the grant was described with sufficient definiteness to allow its segregation from the lands of the United States, but also to show that it includes the mines sued for in the present case, a still higher degree of proof should be required.

The district court of San Miguel County said on this subject, in instructing the jury:

“From the evidence introduced here, it seems to me it cannot be doubted that it is a fact, that these two—the western and southern boundaries are very imperfect. You claim that it is bounded by a straight line from the land of Juan Garcia de las Rivas. That only covers a small part of the western boundary as claimed. The Cerillos Grant comes over it. Which would be the better grant I don't know. It is certainly a grant, which certainly could not be decided without evidence and without a hearing. The line on the south is also I think very doubtful—as to where that line is—that is the arroyo Cuesta del Oregano—several witnesses testified that there was such a Cuesta of the Canada, and it was at such a place while others testified there is no such place at all. Four or five witnesses—I don't recall how many—testified

there is no such place as the Canada Oregano, and that they never heard of it. I don't think it could be ascertained without taking a great deal of testimony.

"I am of the opinion that this is not a perfect grant within the contemplation of the law, and not being a perfect grant that the plaintiff, Mariano F. Sena, has no title to it."

This is a specific finding by the trial court to which the issues were submitted by both parties, and under the rule announced by this court, in *Buetell v. Magone*, 157 U. S. 154, it must be affirmed "if there be any evidence in support thereof."

IV.

Defendant in Error Has Had Such Adverse Possession of the Premises That the Statute of Limitations Has Run in Its Favor.

The only rights claimed by defendant in error in this case are such as are created by the locations of the various mining claims, and the possession held thereunder. Of course, if the Jose de Leyba Grant is held to be imperfect, and we believe it should be, then the right of possession of defendant in error under these mining claims is absolute. But even if the Leyba Grant is a perfect one, giving plaintiff in error a complete paper title, to the grant as a whole, nevertheless the right of defendant in error to the property here in question must be sustained on account of the adverse possession.

On his branch of the case there is no dispute on the facts. The New Mexico statute of limitations as to real estate requires ten years adverse possession. This proceeding was commenced May 14th, 1903. The min-

ing claims were located as follows:

The Castilian Quartz Mining Claim (now the Old Castilian), in 1885 (R., p. 83).

The Muniz, in 1890 (R., p. 83).

The Gem, in 1891 (R., p. 84).

The Morning Star, in 1891 (R., p. 83).

The Sky Blue Turquoise, in 1892 (R., p. 84).

All of these claims were located under the mining laws as containing valuable deposits of turquoise, possession was taken and the annual labor done as required by law (R., pp. 88-94).

Prior to 1892, when the present superintendent, McNulty, took possession, the mines then located were held and worked by the claimants, and since that time defendant in error, through its superintendent, has had the property in actual possession, working and developing the same (R., pp. 99, 101, 102, 105-108, 112, 113, 119, 120, 129, 130, 134).

The necessary monuments were erected and notices posted, the monuments being still in existence. (R., p. 134.)

A house was built on the Muniz Mine in 1890. (R., pp. 129, 130.)

The defendant has been continuously developing the property and has expended on the Muniz Mine alone over \$25,000.00. (R., p. 109.)

No question is raised as to the chain of title from the original locators to defendant in error, and it is in fact complete. (R., p. 84-88.)

It will thus be seen that these mines have been in the actual exclusive physical possession of their claimants for more than the statutory period. There is not a word of evidence that this possession has ever been interfered with or that any hostile claim was ever asserted by anyone until the proceeding in the

Court of Private Land Claims, instituted by plaintiff in error. It is hardly consistent for counsel for defendant to assert that the facts as to the early possession of the Leyba Grant, deduced from mere claims of ownership, are sufficient to raise a presumption of title, and at the same time to argue that the actual possession shown in the mine claimants is insufficient to constitute adverse possession under the statute. As to the argument that no taxes were paid on the land it would seem sufficient to reply that none were assessed and that the claims were exempt from taxation under territorial law. The payment of taxes was, therefore, an impossibility.

The fact that the mine claimants held under mining locations, believing the land to be a portion of the public domain of the United States, did not prevent the running of the statute of limitations in their favor.

The principal contention of plaintiff in error on the question of the statute of limitations is that to cause the running of the statute the possession must be adverse to all the world, and that the possession in the present case being in subservience to that of the United States, the statute cannot be availed of as a defense.

Although in the case of mining locations on the public domain the ultimate fee is vested in the United States, yet such a mining claim is always treated as being an estate in fee and as a distinct vested right of property founded upon possession and appropriation. The locators are treated as against everyone but the United States as the owners of the land and mines therein. The legal title is in the United States but the equitable title is in the claimant, and if he has properly complied with the law, the United States

holds the legal title only as trustee for him. That this is the law is laid down in many decisions.

Forbes v. Gracey, 94 U. S. 766.

Noyes v. Mantle, 152 U. S. 348.

Merritt v. Judd, 14 Cal. 60.

Hughes v. Derlin, 23 Cal. 502.

Aspen, etc., Co. v. Rucker, et al., 28 Fed. 220.

McFeters v. Pierson, 24 Pac. 1076.

It will thus be seen that the locator of a mine under the laws of the Government does acquire property in and a title to his land. If his location is properly made and the laws governing it obeyed, he has a right even superior to the United States. The ultimate title may still be in the Government, but it is merely the naked legal title held in trust for the locator and obtainable by him whenever he pleases. He does not claim a title subordinate to that of the United States, but that he is acquiring the title of the United States in accordance with its laws. The government cannot deprive him of his mine so long as he conforms to these laws. It will thus be seen that the objection of plaintiff that defendant has not claimed adversely to the United States is technical in the extreme. It has claimed and is claiming adversely to plaintiff. But let us see if the contention is even technically correct according to the authorities that have already definitely passed upon the question.

One of the earliest cases in which a similar question was before the courts is *Clements v. Runckel*, 34 Mo. 41. In that case the defendant had entered under the pre-emption laws of the United States, and for that reason it was contended that his possession was not sufficiently adverse to cause the statute to run. Judgment in the court below was for defendant, and the Supreme Court, in affirming that judgment, says:

"This was an action of ejectment. The plaintiff showed a clear paper title. The defendant relied upon length of possession under the statute of limitations. The only question presented is upon the character of that possession—whether it was adverse to the plaintiff. There was judgment for the defendant."

"The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person (the United States), who was supposed to be the proprietor, and as to the United States their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have a right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land.

"The defendant has the actual possession, within the meaning of the statute of limitations, with a claim, not of absolute title it is true, but of a right to acquire the absolute title, which right was adverse to all other persons.

Upon a very similar state of facts, the Supreme Court of Pennsylvania has held such possession adverse to the owner. (*Sweeny v. McCullough*, 3 Watts 345; *Jones v. Porter*, 3 Penn. 132.)"

The Supreme Court of California, in *Hayes v. Martin*, 45 Cal. 560, in holding that the statute would run in favor of a defendant in possession of a Mexican land grant, the survey of which had not been approved, says:

"It is not requisite that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States, either with or without a claim on his part, of the right to acquire the title from

the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action."

To the same effect as the foregoing are the following California and Texas cases:

McManus v. O'Sullivan, 48 Cal. 7.

Page v. Fowler, 28 Cal. 611.

Page v. Fowler, 37 Cal. 108.

Fanish v. Coon, 40 Cal. 57.

Converse v. Ringer, 6 Tex. Civ. App., 24 S. W. 705.

Price v. Eardley (decided in 1903), 77 S. W. 416.

Village Mills Co. v. Manley (decided in 1906), 94 S. W. 102.

Whitaker, et al. v. Thayer, et al., 86 S. W. 364.

Sellers v. Simpson, 115 S. W. 888.

Hoencke v. Lomax, 118 S. W. 817, 119 S. W. 842.

The Federal Courts have followed the decisions of the Western States on this point. Indeed, the case most similar to the one at bar to be found in any of the reports is *Francoeur v. Newhouse*, 43 Fed. 236. In the cases cited above the defendant was in possession under the homestead or pre-emption laws, while in *Francoeur v. Newhouse* he claimed under mining locations. The difference, of course, in no way affects the principle. In the latter case the court held distinctly that the defendant was in adverse possession and that the statute ran in his favor, using the following language:

"The testimony all tends to show that these parties held, claiming by their own right, first the mining claims as taken up and conveyed to them under the laws of the United States, and after-

wards under the patent issued in pursuance of those laws of the United States upon such claim. I instruct you that the title for a portion of the time unless granted to the railroad company was in the United States. If it was in the United States, or believed to be in the United States, it does not prevent the operation of the statute of limitations, if the claim was adverse to the Central Pacific Railroad Company. At least, the most that can be said is, that the matter was doubtful as to where the title was, and there was a good foundation for claiming that this was mineral land, and excepted from the grant, so that a party could very well go in there in good faith, buy a claim, located by some one else, and under the laws of the United States continue his possession claiming under that claim, present his claim for a patent to the United States, obtain it, and continue under it in good faith. On that question I will read you a passage from the decision in the case of *Hayes v. Martin*, in 45 Cal. 563, which covers the exact ground. 'It is not requisite that the party who relies on the statute should show that he claims his title in hostility to the United States.' These parties did not claim in hostility but went in under the laws of the United States, and finally got a patent. 'He may admit the title in the United States, either with or without a claim on his part or the right to acquire the title from the United States, and it is sufficient if he had such possession as is required by the statute, and claim in hostility to the title which the plaintiff establishes in the action.' *Id.* And this doctrine was repeated in *McManus v. O'Sullivan*, 48 Cal. 15. These parties not only admitted the title of the United States but claimed the right to enter under their laws, and they claimed a patent under those laws and got it. They claim in hostility, as far as the evidence shows, to the title of this complainant. The testimony tends to show that their possession commenced as early as 1882 or 1883 at the latest.

The testimony also tends to show that the possession was continuous under the claims to a part, with a claim to the whole, according to the boundaries of their deed, down to the commencement of this suit. If you find that to be a fact, the bar of this statute attaches, and you must find a general verdict for the defendant, and a verdict for the defendant under this last special issue submitted to you."

To the same effect is *Northern Pac. R. Co. v. Krnich*, 52 Fed. 911. In this case the defendant plead the statute of limitations based upon an entry under the pre-emption laws of the United States. The Court says:

"Plaintiff filed its motion to strike out this clause in said answer setting up the statutes of limitation, on the ground that the same was inconsistent with the allegations in the sixth clause of the answer, which shows that defendant did not claim said land adversely as against the United States, but under and in subordination to its laws, and acknowledged its title to the same.

"It is admitted that the general rule is that, in order for one to make out a title by adverse possession, the person so claiming must claim title to the premises possessed as against all others. *McCracken v. City of San Francisco*, 16 Cal. 591. It is true that the decision is limited in this case to the possession maintained under color of title. But I am unable to find any difference upon this point as to whether a person enters under color of title or without. Perhaps a better way of stating the nature of claim as to title that should be made by one claiming adversely land is that he should claim as owner. The fact that he admits that another is owner, or does not claim title against all others, would generally be insufficient. There is no doubt that in the answer defendant admits ownership of the property in the United

States. Is there any exception as to the general rule I have stated? I think in all of the western states there is an exception thereto. If a party claims title to land here against all persons but the United States, that is sufficient. This view is recognized in the cases of *Francoeur v. Newhouse*, 43 Fed. Rep. 236; *Hayes v. Martin*, 45 Cal. 563, *McManus v. O'Sullivan*, 48 Cal. 15.

"In this state I am satisfied the rule is well established not to allow, as a plea of title in a third party, a plea of title in the United States. For many years no one in Montana held title to real property against the United States. The admission, then, that the title of the property was in the United States was not at all inconsistent with the plea of the statute of limitations by defendant as against plaintiff, and the two defenses are not inconsistent. For these reasons the motion of plaintiff to strike out is overruled."

The principal case cited by counsel for plaintiff against the rule laid down by the above authorities is *Altschul v. O'Neil*, 58 Pac. 95, cited in brief of plaintiff in error, p. 51. This is a decision by the Supreme Court of Oregon. The period of limitations in that state is ten years. The suit was commenced in 1898. The defendant had entered into possession of the land in controversy in 1886, believing it to be public land, but made no attempt to acquire right or title until 1894, when he attempted to enter the land as a homestead. The defendant testified that it was his intention, during all the time he was in possession, to get the land from the government. The distinction, therefore, between that case and the one at bar is obvious. In that case defendant was not even rightfully in possession and for years was not even attempting to acquire title. In the present case defendant and its grantors have always been legally in possession, taking such

steps to acquire the property that the government has come to hold the title merely as trustee for it. The case, therefore, clearly falls within the rule announced in *Francoeur v. Newhouse*.

Since the decision in *Altschul v. O'Neil* the rule it enunciates has been repudiated by the highest court of several states, the Supreme Court of Oregon has overruled it, and the Supreme Court of the United States has announced a contrary rule.

The question came before the Supreme Court of Minnesota in the year 1904, the contention being the same as in the case at bar. That court reviews the various cases on the subject and declines to recognize *Altschul v. O'Neil* as authority, using the following language:

"Counsel for the plaintiff contends, in effect, that under this rule the possession of a disseisor can never be adverse to any one if he enters intending to acquire the title of the United States, if it has the title, as he erroneously believes, because the United States is included in the words 'to the exclusion of all others,' used in stating the rule. The rule is general in its terms, and the construction of it urged seems to be narrow and unreasonable. Statutes of limitations do not operate against the state or general government unless there be an express provision or necessary implication to that effect, and title to public land cannot be acquired by adverse possession. Now, if a person enters upon land, erroneously believing it to belong to the United States, with the intention of acquiring title to the exclusion of all others by his entry and settlement under the homestead law, how can it be reasonably claimed that, because he did not further intend to do that which was a legal impossibility, his possession is not adverse, within the true meaning of the rule? It must be held, upon principle and authority, that the rule

excludes by necessary implication the United States, and that a person may admit its title to the premises, if any it has, and hold them adversely to the exclusion of all others. (Cases cited.) The case of *Altschul v. O'Neil*, 35 Or. 202, 58 Pac. 95, which is cited and relied upon by the plaintiff, is opposed to this conclusion. That case reviews the cases we have cited, and seeks to distinguish them, and to show that, upon principle and authority, there is no exception in favor of the United States, and that, to constitute adverse possession, the disseisor must intend to hold in hostility to its title, if any it has. We have attentively considered this decision, and, notwithstanding our great respect for the learned court making it, we are unable to concur in its conclusion. We accordingly answer the controlling question in this case in the affirmative, and hold that a person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the homestead law, may acquire title thereto by adverse possession as against the true owner."

Moore v. Blumer 93 Minn 295
This question was presented to the Supreme Court of Iowa in 1905, in the case of *Blumer v. Iowa R. Land Co.*, 105 N. W. 342, and the case of *Altschul v. O'Neil* was relied upon. That court after stating that the claim of one who enters land for the purpose of acquiring title from the government is quite as hostile to all others as though patent had been issued, and that the weight of authority is to the effect that the claim may be subservient to the government if hostile to all others, refers to the case of *Altschul v. O'Neil*, as follows:

"The only decision we have discovered to the contrary is *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95. But there the company under which plaintiff held became entitled to the land in 1886, and,

though defendant had occupied it since 1866, he had made no effort to acquire the land from the government as a homestead until 1894. His application was then rejected by the officers of the local land office, and their decision later confirmed on appeal. Suit was begun in 1898, and the statute of limitations of 10 years pleaded in bar. It is manifest that defendant was a mere trespasser throughout. His attitude was entirely different from that of a party whose application has been received by the officers of the government, and who has entered into possession in good faith and continues therein in what he supposes to be in conformity with the laws of Congress. Nevertheless, the court delivered an opinion exhibiting extended research to the effect that a claim of right upon which adverse possession may be based must be against the whole world, including the government. No doubt the judges have made all the statements attributed to them in this opinion, but it is to be said in extenuation that each had application to the particular facts of the case in hand, and that in none, save those the court declined to follow, was the question as to whether the fact that the claim was subservient to the government involved. Indeed, the character of the claim under a government entry does not appear to have been given due consideration. If effective, it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude every one from its enjoyment, and even as against the government to assert the right to divest its title by compliance with the law."

The last cited case was taken to the Supreme Court of the United States in *Iowa Railroad Land Company v. Blumer*, 202 U. S. 482, and although this court did

not refer to the case of *Altschul v. O'Neil*, it affirmed the decision of the Iowa Court, using the following language:

"After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and, so far as the record discloses, made no objection to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous, and adverse, and, unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the statute of limitation. While, until the time had run required by the timber culture act, Carraher would have been in no position to claim title as against the government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land, and held under no other title. The Supreme Court of Iowa has held that, under such circumstances, the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher."

Since the decision of the above cited cases, the Supreme Court of Oregon has refused to follow the rule it laid down in *Altschul v. O'Neil*. The question arose in *Boe v. Arnold*, 102 Pac. 290, and the decision is in direct conflict with the contention of plaintiff in error in the present case. In overruling *Altschul v. O'Neil*, the Court says:

“The authorities supporting the doctrine announced in *Beale v. Hite*, *supra*, and in the cases of *Altschul v. O'Neill* and *Altschul v. Clark*, *supra*, are cited and thoroughly commented upon in the opinions in those cases, and it is needless to discuss or cite them here. But we are of the opinion that the weight of authority both in the number of courts and in the reasoning advanced is in favor of the contention of the respondent.”

And later it is said:

“The latest decisions of the Supreme Court of the United States rendered in cases having many features similar to the case at bar ought of themselves in our judgment to justify this court in overruling and receding from the doctrine enunciated in *Altschul v. O'Neill*, *Altschul v. Clark*, and *Beale v. Hite*, so far as they conflict with the views announced. *Missouri Land Co. v. Wiese*, 208 U. S. 234; *Missouri Land Co. v. Wrich*, 208 U. S. 250; *Iowa R. R. Co. v. Blumer*, 206 U. S. 27. In view of the authorities here cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Holding these views, we are of the opinion that the judgment of the court below should be affirmed; and it is so ordered.”

The case of *Boe v. Arnold* contains an exhaustive discussion of the authorities, and is the most instructive case upon the subject, and makes further citation of authority unnecessary.

The case of *Tyrec Consolidated Mining Co. v. Langstedt*, 136 Fed. 128, is also cited by plaintiff in error.

That decision is avowedly based upon *Altschul v. O'Neil*, and since it has been overruled, has necessarily lost its value. Moreover, in that case plaintiff's grantor had derived title by patent from the United States, and the question was solely whether or not the statute of limitations would run in favor of defendant prior to the issuance of the patent. The court reaffirms the doctrine that the statute does not run against the United States, and against its grantee only from the date when he acquires title.

The only other recent case on this subject cited by plaintiff in error is *Hunnewell v. Burchett*, 152 Mo. 611.

In that case the defendant was not in possession under any claim whatever. Although believing the land to be public land of the United States, he had made no effort to acquire it by homestead entry or otherwise. He was a mere trespasser without any claim of right whatever, and in an entirely different position from one who enters and holds land in good faith for the purpose of acquiring the title. Under these circumstances the court correctly decided that the statute would not run.

The non-residence of the owners of the mining claims, or their ownership by a foreign corporation with no designated agent in New Mexico, did not stop the running of the statute of limitations.

The question of the effect upon the defense of limitations of the failure of defendant in error, a foreign corporation, to name an agent in New Mexico was raised by certain paragraphs of replications filed by the plaintiff, shown on pages 13 to 18 of the record. On demurrer these paragraphs were stricken out. This action of the trial court is now assigned as error. Its correctness depends necessarily upon the contention

that the facts plead in these paragraphs of the replication were not sufficient to affect the running of the statute of limitations. The New Mexico statute of limitations as to real estate is found in section 2937 and 2938 of the Compiled Laws, and in Chapter 63 of the laws of 1899. It is unnecessary to discuss the question as to which of these statutes governs the case, as the portions essential to this argument are the same. Each provides a ten-year period of limitation in favor of a person who has held adverse possession of real estate during that time, under certain fixed conditions. No class of persons holding adverse possession is excepted from the operation of the statute. Its protection is open to all, and there is no provision that foreign corporations or non-residents may not take advantage of it. In the Supreme Court of New Mexico counsel for plaintiff in error contended that such an exception was provided in Section 2921 as amended by Chapter 62 of the Laws of 1903, but as no such argument is made in the brief filed in this court, we take it that this contention is abandoned. In any event, the position is wholly untenable for the reason that the section cited applies only to personal actions and does not purport to govern actions for the possession of real estate. It is obvious that there is a necessity for providing that the period of limitation in actions where a personal judgment is sought shall not run while the defendant is beyond the jurisdiction of the court, and no such necessity where the action is for the recovery of the possession of real estate. In personal actions it is impossible to get service on the defendant or obtain judgment during his permanent absence, while if the defendant has brought himself within the protection of the statute limiting actions for the recovery of real estate, he must be in actual possession,

by himself or tenants, and consequently service and judgment are both possible. The action of ejectment may be brought either against the actual claimant or the tenant in possession. (Sec. 3167.) Up to 1893 it apparently could only be brought against the tenant. (Sec. 3162.) The plaintiff and his grantors therefore always had a method for the recovery of the possession of the lands in question, irrespective of whether or not defendant and his predecessors were actually within the Territory.

The argument made in the brief of counsel for defendant in error to the effect that the statute should not run while service upon the defendant cannot be had is therefore inapplicable to the facts of this case, nor are the authorities quoted in point.

A well considered case analogous to the one at bar, and which points out the distinction between real and personal actions in this respect and gives a reason for it, is *City of St. Paul v. Railway Co.*, 45 Minn. 387. In that case as in this the argument was advanced that the defendant being a foreign corporation could not have the benefit of the statute of limitations. The court, after a discussion of the Minnesota statutes, proceeds:

“But we will put our decision on the broader ground that, whether the action be against a corporation or natural person, the exceptions contained in section 15 do not apply to the time limited in section 4, but only to those actions where the time begins to run when the cause of action against the defendant arises. Where land is held adversely there may be twenty successive possessors, each in privity with his predecessors, so that each may tack to the time of his own possession the time of possession of all those preceding him. If an action be brought against any one of the possessors after the first, the time is not to be

counted from his entry—from the time when the plaintiff might have sued him, but from the time of the first entry. That entry, being under claim of title hostile to that of the owner, is a disseisin of the owner, and that disseisin continues so long as the hostile entry and possession is maintained, and if continued for twenty years the remedy of the owner is gone; the adverse holder becomes practically the owner of the land. Land may be adversely held through the tenants or agents of the disseisor. It is not necessary that he should be personally in possession, nor is it necessary that he should be within the state, so that process may be served on him. It is necessary, to constitute adverse possession, that there be at all times some person in an action against whom the real owner may recover the possession of the land. If the disseisor be in possession by tenants or agents, the owner may recover the possession from them, and reinstate his own seisin. From the nature and requisites of adverse possession the owner has always, during the twenty years, a remedy against it, whether he is able to bring an action against the disseisor in person or not. So that absence of the disseisor from the state does not necessarily interrupt the disseisin."

The New York cases cited in the brief of counsel for plaintiff in error, are, as he says, based upon the peculiar wording of the New York statute. Furthermore, no one of them involves the possession of real estate, but are cases of purely personal actions, suits on accounts, for torts, etc. The first case cited in that brief from Nevada, *Robinson v. Imperial Co.*, 5 Nev. 44, is based wholly upon the New York decision in *Olcott v. Ry. Co.*, 20 N. Y. 221, the Nevada Court simply following that ruling and wholly failing to draw the plain distinction between personal actions and those brought for the possession of real estate. The

cases cited in 10 Nevada avowedly follow the case of *Robinson v. Imperial Co.*, not on the ground that these cases were properly decided, but exclusively on the principal of *stare decisis*. The authority of such cases is certainly doubtful.

There is no statute in New Mexico upon which the contention of plaintiff can be based. This being the case, the defendant is confronted with the rule that courts will not insert into the statute of limitations exceptions not provided for by the Legislature unless they arise from an "invincible necessity."

It is to be presumed that the Legislature in passing the law made all the exceptions that it considered necessary.

In the case of *McIvor v. Regan*, 2 Wheaton 25, Chief Justice Marshall, speaking for the Court, said:

"Whenever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far, for this Court to add to these exceptions. It is admitted, that the case of the plaintiff is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a county are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiff's labored, respected the trial, not the institution of their suit. There was no obstruction to the bringing of this ejectment at an earlier day. * * * If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though

created by the legislature, shall take such cases out of the operation of the act of limitations unless the legislature shall so declare its will."

To the same effect in the case of *Madden v. Lancaster County*, 65 Federal 195, in which it is said:

"But it was the province of the legislature and not that of the courts, to fix the conditions on which the rights of action it created might be enforced, and to name the exceptions to these conditions, if any. The legislature has made no exception, on account of any of the matters to which we have referred, or the express condition that it imposed upon every right of action it created by this act. The conclusive presumption from this fact is that it intended to make none, and it would be judicial legislation for this court to do so."

And see also, to the same general effect, the case of *Lindhauer Mercantile Co. v. Boyd*, 70 Pacific 568, in which the Supreme Court of New Mexico, says on page 571, in speaking of exceptions contained in our statute as to limitations in personal actions:

"There is no ambiguity in the language used in section 2921 of our statutes. The language is in common words, clear and explicit. Whether or not it is a just or wise law, it is not for us to say. It is not for the court to legislate, nor is it for the court to repeal legislative enactments. While the court has the physical power to annul legislative enactments, it has no legal or moral right so to do, and such assumption of authority is thoroughly obnoxious to our form of government and ought never to be indulged in."

In the case of *Amy v. Watertown*, 130 U. S. 320, this Court expressly decided that the impossibility of getting service on the defendant would not constitute an exception to the statute. Defendant in that case had

evaded service and by its own actions made service impossible. The Court, after a general discussion of the statute and exceptions to it, says:

“Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in cases where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. *Wilkinson on Limitation*, 40; *Hall v. Wyborn*, 1 Shower 98. This difficulty was remedied by the act of 4 and 5 Anne, c. 16, sec. 19, which declares that if any person against whom there shall be any cause of action be at the time such action accrued beyond the seas, that action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of inability to serve process occasioned by the defendant's absence from the state. It has provided for no other case of inability to make service. If this is an omission, the courts cannot supply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive.”

The action in the Court of Private Land Claims did not stop the running of the Statute of Limitations, nor is this action a “continuation” of that proceeding.

As a defense against the statute of limitations, plaintiff in his replication sets up the bringing of the action

in the Court of Private Land Claims, in 1899, for the confirmation of the Leyba Grant. A demurrer to this plea was sustained, and that action of the trial court is now assigned as error.

This contention of plaintiff is based upon section 2925 of the Compiled Laws of New Mexico of 1897, which reads as follows:

“Section 2925. If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first.”

This section is compiled from Chapter 5 of the laws of 1880, where it appears as Section 12. In language it limits its effect to “the purposes herein contemplated,” necessarily meaning contemplated by the act of which it was a part.

A reading of this act will demonstrate that it applies only to actions on judgments, bonds, accounts, etc., and not to actions for the recovery of real property. Furthermore, Section 16 of that act, now compiled as Section 2930, specifically provides that none of the provisions of the act shall apply to “any action or suit which by any particular statute of this Territory is limited to be commenced within a different time.” At the time of the passage of this act, actions for the recovery of real estate were “limited to be commenced at a different time by a particular statute of this Territory,” namely by Section 2937 of the Compiled Laws passed prior to 1865. That section provides that a suit to break the running of the statute must be “effectually prosecuted.” Certainly an action in which a party is defeated is not “effectually” prosecuted by him.

The argument that the effect of this section was changed by reason of the position in which it appears in the compilation of 1884 is untenable. The compilation of 1884 gives no additional validity or effect to the laws therein contained, is not a new enactment of them, but merely an arrangement of them in one volume. The act under which the compilation was made, which appears on page 82 of the brief of plaintiff in error, demonstrate that this was the effect intended by the Legislature in authorizing the compilation.

Furthermore, the action in the Court of Private Land Claims was not for the purpose of recovering possession of these mining claims. That court had no jurisdiction to give any judgment for possession nor to adjudicate the right of possession as between Sena and the American Turquoise Company. The only question in that case was as to Sena's right to have the grant confirmed as against the United States. Section 13 of the act establishing that court expressly provides that "no proceeding, decree or act under this act shall conclude or affect the private rights of persons as between each other," such controversies being left to the decision of the local courts.

United States v. Conway, 175 U. S. 60.

It is confidently asserted that if the defendant in error (plaintiff below) has a complete and perfect title it is because the grant title was complete and perfect, and vested the grantee with full legal title when the grant was made, and any one holding such title might assert the same in the courts of the country, when such assertion became necessary to oust trespassers or adverse holders, and did not require any other recognition than contained in Article VIII of the Treaty of Guadalupe Hidalgo.

This court has never held that, one holding a full and complete title to a grant of land made by either the Spanish or Mexican governments, which was complete and perfect at the date of the Treaty, might not maintain an action of ejectment thereon in the courts of this country, when his possession was invaded by an adverse holder, although the title asserted had received no other recognition than that of the Treaty. It may be true that local courts in New Mexico have declined to recognize such title as a basis for such action, prior to its recognition by the political branch of this government, but this court has never so held, because the Treaty and the Laws of Nations, independent of statutory recognition by this government, guaranteed its full protection and recognition in the courts of the land. If the claimant was content with his title, he might assert it and the laws of Spain and Mexico bearing upon the title, in determining its validity and the estate conveyed thereby, are to be treated as domestic laws. So that, if this grant title was complete and perfect when the country was ceded to the United States, it could have been asserted and the statute of limitations began to run upon the adverse entry and holding by defendants.

Its running was not interrupted by the passage of the Private Land Claims Act. Indeed, the claimant might, so far as the laws apply, have maintained his action for possession in the local courts, and at the same time have maintained his action for confirmation of his title in the Court of Private Land Claims. No statute prohibits and no reason can well be suggested precluding such a course.

The only authority now justifying the plaintiff in the course he pursues is the fact that this court directed the dismissal of his petition for confirmation,

without prejudice to his rights to proceed in the local courts upon the Spanish title which he claims to hold, if he be so advised. Therefore, we contend that if the statute of limitations ever began to run against this title by reason of the entry upon these mining claims, it has not been interrupted nor suspended by any action which the claimant has taken or has neglected to take and we, therefore, contend that his plea against the running of the statute of limitations was without merit and the demurrer to it was properly sustained.

The laches of the claimants of the Leyba Grant, amount to an equitable estoppel and prevent a recovery by plaintiff in error.

This Court, in passing upon the Leyba Grant in *Sena v. U. S.*, *supra*, held that the grant should be refused confirmation on account of the laches of its claimants, stating that the doctrine of laches was peculiarly applicable. There is no difference worthy of notice between the proofs then and now before the court. It is admitted by all parties that the Leyba Grant, excepting the mining claims now in question, for more more than fifty years prior to the commencement of this action were vacant and unoccupied, open to the use of the public generally for grazing and other purposes, with nothing to show that it was anything but public domain and with no sign of private ownership or occupation past or present. No attempt was made to have this grant confirmed by the Surveyor General under the Act of Congress of 1854, although the grant claimants are presumed to have had notice of that act and of their rights thereunder. (*Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573-580.) The public land surveys were extended over the tract in 1861, homestead and other entries were made, improvements

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established, patents, secured, mining locations made large and valuable mines developed, and during all this time the Leybas, with an alleged perfect title, made no attempt to assert their rights, and offered no objections.

In 1891 the Court of Private Land Claims was established by an Act of Congress, for the purpose of adjudicating title to lands acquired from the government of Mexico under the Treaty of Guadalupe Hidalgo and Gadsden Purchase, and it was provided that all persons having imperfect titles to land, within the ceded territory, were required to present to that Court for confirmation, their titles thereto within two years from the date of the passage of the Act, otherwise they were to be thereafter deemed forever abandoned and barred.

Those holding perfect titles were permitted to file their claims for confirmation, but, by the Act, were not *bound* to do so. They could decline the permission and stand on the title acquired from the former government. So that it remained for the claimant, or owner of the grant, to determine at his peril, whether or not he would elect to apply for and in the proper cases take confirmation by decree of the Court of Private Land Claims, or stand upon his title. The claimant in this instance did not invoke the jurisdiction of the Land Court until 1899, when he filed his claim in the Court of Private Land Claims, asserting his claim to be a complete and perfect title and asking a decree of that court confirming the same as such. The Court of Private Land Claims, after full trial, held the grant to be imperfect; holding, also, upon the contention made now here, that the possession which plaintiff insists was of such a character that the court should presume his title complete and perfect and all

the requirements fulfilled, was not such a possession as would justify the presumption, and in this court, when the case was heard here on appeal (*Sena v. United States, supra*, l. c. 239), it was said by Mr. Justice Brown for the Court:

“In this connection the court below found that the evidence as to the settlement and occupation of the tract purported to have been conveyed, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, the knowledge of the existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting. In the absence of clear evidence to the contrary we deem it our duty to adopt the opinion of the court below in that particular.”

As we have repeatedly said, the evidence is no more cogent now in respect of the nature and character of possession than when the case was before the Court of Private Land Claims and subsequently reviewed by this court on appeal.

Claimant and his grantors still remained quiescent and allowed adverse rights to be acquired and extensive improvements to be made, until the fall of 1899, when application for confirmation was finally made. Meanwhile defendant and those under whom it claimed, had entered into the actual possession of portions of the premises, and expended large sums of money and succeeded in developing valuable mines. Their possession was open and notorious. On one of the mines alone over \$25,000.00 was spent in development work (R., p. 132). The claimants of the Leyba Grant are presumed to have known of this possession. They made no objection, while the defendant and its grantors made valuable that which before was worth-

less, vacant, unoccupied lands offered to the public as subject to appropriate entry. The mines passed from one purchaser to another for large considerations, was mortgaged and bought in at judicial sale for more than \$85,000. R., p. 86.) No one of these parties by the exercise of the utmost diligence could have ascertained that a claim existed that the mines were included in this grant, and there was absolutely nothing to put them upon inquiry as to any such fact.

This Court has held that the plaintiff in error was guilty of such laches as to preclude his obtaining a confirmation of the grant as against the United States. As between the grant claimants and the United States the question of the possession, expenditures and improvements upon the mines now in question was unimportant, but in the present case these additional facts are sufficient to convert the laches of the claimants into an equitable estoppel. The elements necessary for such estoppel, the silence of the grant claimants when they were bound in good faith to disclose their interest, the notoriety of the possession of defendant in error and its predecessors, and of their expenditure of large sums of money in the improvement and development of the mining claims, the presumed knowledge of the grant claimants, are all present. If it be necessary to hold that an equitable estoppel has arisen, the facts on which to base such holding have been fully proven and are undenied.

Indeed, the facts here are very similar to those in *Kirk v. Hamilton*, 102 U. S. 68, in which this court held that an equitable estoppel had arisen, the principal difference being that in the case cited the party estopped had actual knowledge of the improvements being made on his land, while in this case such knowledge can be presumed.

And whether the facts submitted in this case prove laches or an equitable estoppel is immaterial to the decision of the present case. In either event they are sufficient to bar a recovery by plaintiff in error.

The rule governing such a state of facts is clearly stated by this court in the case of *Gildersleeve v. New Mexico Mining Company*, 161 U. S. 573.

“The record shows that during twenty-two years, between the passage of the act of 1854 and the issue of the patent in 1876, the collateral heirs remained supinely indifferent to the assertion of their supposed title, while during the greater portion of this time the New Mexico Mining Company was expending labor and incurring the expense connected with the obtaining of the letters patent. So, also, these alleged heirs from the date of the death of Ortiz permitted Mrs. Ortiz, Greiner, and those holding under him, including the mining company, to remain in undisturbed possession of the property and to engage in large outlay for its development without, so far as appears, even claiming rights in themselves, until more than four years had elapsed from the final granting of the patent. * * * There was an uninterrupted use and enjoyment by the widow Ortiz, and those claiming by conveyance from her of the property in question, from the death of Ortiz in 1848; no attempt was ever made to assert rights, if any, of the collateral heirs of Ortiz in this property until the year 1880. They stood by and witnessed the expenditure of large sums of money upon the property and did nothing exhibiting an intention to assert their supposed rights. No attempt was made in the pleading of *Gildersleeve* to offer any explanation of this long continued acquiescence in the rights of those in possession of the mine and of the privilege connected therewith. Under such circumstances, we think the heirs and those claiming under them are not entitled to equitable relief. Finding at

the very threshold of the case the existence of such laches on the part of complainant as debars him from obtaining the equitable relief which he invokes, we have not deemed it necessary to express any opinion on the other questions presented by the record."

In the case of *Patterson v. Hewitt*, 195 U. S. 309, this court in applying this doctrine to a case involving the claim of an interest in a certain mine, said:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth millions. Years may be spent working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

Upon this question the principal argument in the brief of plaintiff in error is that the laches of plaintiff may not be taken advantage of by the defendant in an ejectment proceeding.

The argument that equitable defenses may not be relied upon in actions of ejectment has been often presented to the courts and in modern times generally repudiated. The general rule is settled in this court in the case of *Kirk v. Hamilton*, 102 U. S. 68, which affirmatively holds that the defense of equitable estoppel is effective in such actions. To the same effect are the following cases:

Dickerson v. Colgrove, 100 U. S. 578.

Benz v. Seawall, 65 Fed. 753.

Tracy v. Roberts, 88 Me. 317.

Allen v. Seawall, 70 Fed. 564.

But whatever may have been the correct common law rule on this subject, the question in New Mexico is controlled by statute, and express sanction is given to equitable defences in all actions.

Section 6 of Chapter 144 of the laws of 1905 reads in part as follows:

“That sub-section 175 of Section 2685 of the compiled laws of New Mexico of 1897, be and the same is amended so as to read as follows:

“All statutes in force at the date of the passage of this act, (Section 2685) or enacted since then, or hereafter enacted relating to * * * ejectment * * * shall not be held to be repealed by the enacting of said Section 2685 of the Compiled Laws of 1897, but said Section 2685, and all other statutes relating to said subjects shall be construed together as if all of said laws were enacted at the same time, and shall receive such construction from the court as to harmonize the same as parts of one act, and no repeal shall be held to have been made by implication or conflict, except so far as may be necessary to harmonize the said laws and give effect to them as one uniform system.”

It is, then, no longer true that our code does not apply to actions of ejectment. On the contrary the provisions of law governing the special statutory action called ejectment, and the code, are to be construed together and harmonized as parts of one act. The code, Section 2685, now applies to all such special actions, unless there should be a direct conflict, in which event perhaps the special act would govern. Subsection 40 of Section 2685 reads in part as follows:

“That defendant may set forth by answer as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.”

Under the act of 1905 this section is to be construed as part of the law governing ejectment, under which plaintiff's action is instituted. It expressly makes equitable defences available, and under it there can be no doubt of the right of defendant in the present case to plead the laches of plaintiff and to rely upon the defense so far as may be necessary.

This provision of our code is found word for word in the parent code of New York, also in Iowa, Missouri and most of the other code states.

It has been frequently construed by various courts, although its language would seem to be plain enough to make construction unnecessary.

In *Dobson v. Pearce*, 12 N. Y. 156, which has become a leading case in New York upon the subject, the court says:

“The Code, Sec. 69, having abolished the distinction between actions at law and suits in equity, and the forms of all such actions as theretofore existing, an equitable defense to a civil action is now as available as a legal defense. The question now is, ought the plaintiff to recover; and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance.”

And in the case of *Chase v. Peck*, 21 N. Y. 581, the modern rule applicable to proceedings for the recovery of real estate is broadly laid down as follows:

“If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from

Aylesworth to Mrs. Howland has been found to be fraudulent. I think, the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles: and if, upon the application of these principles, the plaintiff ought not to be put in possession of the premises, he cannot recover in the action."

In the case of *Chouteau v. Gibson*, 67 Mo. 38, an ejectment suit, the Supreme Court of Missouri, says:

"That the defendant Chouteau had the right to interpose an equitable defense to the action of Gibson, and not only prevent a recovery upon establishing such defense, but would be entitled to affirmative relief, if asked, there can be no doubt, for it is expressly provided in the code, that 'a defendant may set forth by answer as many defenses or counter claims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both' "

The rule is followed by the Supreme Court of Iowa in the case of *Rogers v. Gwinn*, 21 Ia. 58, where it is said:

"Our statute allows equitable defenses to be pleaded in actions at law. Rev. Secs. 2617, 2880. Under the answer filed in this case the defendant is entitled to the same relief which the same facts would, under the former practice have authorized if he had made them the ground of a bill in chancery directly assailing the judgment."

The circuitous practice of a bill in chancery to enjoin the law action and for relief is, under the Revision, no longer necessary, if indeed, it be any longer, strictly speaking, proper."

The decisions to this effect are uniform and might be multiplied indefinitely.

These authorities go to the general rule that equitable defenses may be made in ejectment proceedings. Laches being such a defense, no reason is seen why the general rule is not applicable.

Respectfully submitted,

MATT. G. REYNOLDS.

THOS. B. HARLAN.

STEPHEN B. DAVIS, JR.

Counsel for Defendant in Error.

SENA v. AMERICAN TURQUOISE COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF
NEW MEXICO.

No. 73. Argued April 18, 1911.—Decided May 1, 1911.

In an action of ejectment in New Mexico, the trial court was of opinion that the boundaries under which plaintiff claimed did not include the land in dispute, and the Supreme Court of the Territory affirmed on the ground of defect in plaintiff's grant and that the evidence as to possession was too vague to raise a presumption in place of proof; and this court affirms the judgment.

Where both parties move for a ruling, and there is no question of fact sufficient to prevent a ruling being made, the motions together amount to a request that the court find any facts necessary to make the ruling; and, if the court directs a verdict, both parties are concluded as to the facts found, and unless the ruling is wrong as matter of law the judgment must stand. *Beuttell v. Magone*, 157 U. S. 154.

THE facts are stated in the opinion.

Mr. Frank W. Clancy, with whom *Mr. Harry S. Clancy* was on the brief, for plaintiff in error.

Mr. Matt G. Reynolds, with whom *Mr. Thos. B. Harlan* and *Mr. Stephen B. Davis, Jr.* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

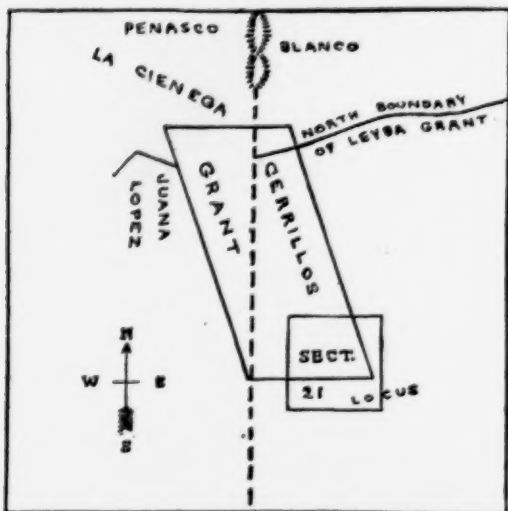
This is an action of ejectment for about fifty acres in Section 21, Township 15 north, Range 8 east in the County of Santa Fe, New Mexico, which the defendant holds under mining claims dating from 1885 to 1892, and located under the laws of the United States. It was brought after the plaintiff's failure to establish title, under a Mexican grant, to a large tract of which this land is alleged to be a part, in the Court of Private Land Claims and in this court on appeal. *Sena v. United States*, 189 U. S. 233. *Ibid.* 504. The decree left open the question whether the plaintiff had a perfect or imperfect title and was without prejudice to further proceedings, as in case of a perfect title the statute establishing the Court of Private Land Claims did not require a confirmation by that court. Act of March 3, 1891, c. 539, § 8. 26 Stat. 854, 857. *Richardson v. Ainsa*, 218 U. S. 289. The former decision was put on the ground of laches, but in the present suit the plaintiff offered some little additional evidence of acts indicative of possession later than any proved before. Both parties, however, moved that the court should direct a verdict. *Beuttell v. Magone*, 157 U. S. 154. *Empire State Cattle Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1. The court of first instance was of opinion that the boundaries of the grant under which the plaintiff claims were not proved to include the land in dispute and directed a verdict for the defendant. The judgment was affirmed by the Supreme Court of the Territory on the ground that the

grant did not appear to have been confirmed as required by a Spanish ordinance of October 15, 1752, 2 White's New Recop. 62, 63, [*51], and that the evidence of possession, &c., was too vague to raise a presumption in place of proof. The plaintiff took a writ of error and brings the case here.

The grant under which the plaintiff claims was made to Joseph de Leyba in 1728. Subject to what was said in the former decision (189 U. S. 233, 237), the boundaries on the north and east may be assumed to be established, but the others give rise to the trouble. They are "on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia del las Rivas." To translate these words into things the plaintiff put in evidence a grant to Miguel Garzia de la Riba of the sitio of the old pueblo the Cienega, dated August 12, 1701, and a grant of the same property from Miguel to his son, Juan Garcia de la Riba, dated March 12, 1704, the latter bounding the property on the east by the Penasco Blanco de las Golondrinas and on the south by the canada of Juana Lopez. He also put in the will of a son of Joseph de Leyba, under whom the plaintiff claims, describing the land granted to his father as bounded on the west with lands of the old pueblo of the Cienega. The Penasco Blanco was shown to be a known natural object. It lies to the north of the north boundary of the Leyba grant, but the plaintiff says that it is to be presumed that the eastern boundary of the Riba grant, and therefore the western boundary of the Leyba grant, was a north and south straight line passing through the Penasco Blanco, and that such a line would include the land in dispute.

But there are great difficulties in the way of this conclusion. It appears that in 1788 a grant was made of land in or known as Los Cerrillos, title under which was confirmed by the Court of Private Land Claims. This tract extends to the east of the line drawn by the plaintiff

through the Penasco Blanco, the eastern boundary extending southeast and northwest from a point north of the northerly boundary of the Leyba grant to near the eastern boundary of section 21 containing the lands in dispute, as is indicated by the diagram below. There is nothing



adequate to contradict the presumption in favor of this grant, and it at once makes impossible the hypothesis that the Cienega, the land of Juan Garcia given as the western boundary of the Leyba grant extended to a straight line running south from the Penasco Blanco through the Cerrillos grant to the west of section 21. Furthermore the southern boundary of the Cienega was the canada of Juana Lopez. This seems to have been to the west of Los Cerrillos, and again to exclude the supposed straight line. The southern boundary of Leyba depended on contradictory testimony as to the existence of an arroyo of the Cuesta del Oregans in the neighborhood and was thought by the trial judge not to be made out. With regard to the pre-

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Opinion of the Court.

sumption as to boundaries it is to be observed that the northern boundary is supposed to be a more or less irregular road, that the eastern is another road running irregularly northeast and southwest and the southern as contended for continues the same line in a somewhat more northerly direction, so that the outline of the supposed grant resembles the peninsula of Hindostan.

There are other serious questions that would have to be answered before the plaintiff could recover, adverted to in the former decision of this court and in the opinions of the two courts below in the present case. But as it is desirable not to draw into doubt any claim that the plaintiff may have to other land not now in suit, we confine ourselves to the ground taken by the trial court. It seems to us impossible to say that the plaintiff produced evidence sufficient to disturb the defendants' mining claim and the possession that it has held so long under the laws of the United States. As both parties moved for a ruling, and as there was nothing more, according to *Beuttell v. Magone*, 157 U. S. 154, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law the judgment must stand. But it hardly is necessary to invoke that principle in this case.

Judgment affirmed.